89-1482

Supreme Court, U.S.
FILED
MAR 19 1990
JOSEPH F. SAPNIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

LAWRENCE COAL COMPANY,

Petitioner.

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

WILLIAM M. RADCLIFFE, ESQ.
Counsel of Record
LOUISE D. MONAGHAN, ESQ.
COLDREN, ADAMS, DEHAAS
& RADCLIFFE
700 Gallatin Bank Building
Post Office Box 1327
Uniontown, Pennsylvania 15401
(412) 437-2711

Attorneys for Petitioner

Batavia Times Publishing Co.
Harold L. Berkoben
Pittsburgh, Pa. (412) 881-7463

Question Presented For Review

I. Is it a violation of Due Process to permit a single member of an Administrative Tribunal to determine a case when the remaining other two members have already been recused due to the appearance of impropriety?

Statement of Interested Parties

All interested parties are listed in the caption of this case.

TABLE OF CONTENTS.

	Page
QUESTION PRESENTED FOR REVIEW	i
STATEMENT OF INTERESTED PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
DUE PROCESS IS NOT COMPLIED WITH NOR IS THE APPEARANCE OF BIAS EXPUNGED BY PERMITTING ONE MEMBER OF A THREE MEMBER ADMINISTRATIVE AGENCY TO MAKE A DETERMINATION WHEN THE OTHER TWO MEMBERS HAVE BEEN JUDICIALLY DISQUALIFIED	7
CONCLUSION	10

Page

Appendix:

Appendix "A"—Petition for Allowance of Appeal Dated December 19, 1989..... 1a

Appendix "B"—Memorandum Opinion and Order of the Commonwealth Court of Pennsylvania Dated July 12, 1989 ..... 2a

Appendix "C"—Adjudication of the Environmental Hearing Board by Robert D. Myers, Dated July 5, 1988..... 9a

Appendix "D"—Opinion and Order of the Commonwealth Court of Pennsylvania (unreported) Dated January 25, 1988..... 54a

Appendix "E"—Adjudication of the Environmental Hearing Board by Maxine Woelfling, Dated May 27, 1986..... 61a

Page

TABLE OF AUTHORITIES.

Cases:

FTC v. Flotill Products, Inc., 389 U.S. 179 (1967) ... 9

Gardner v. Repasky, 434 Pa. 126, 252 A.2d 704 (1969) ... 9

Gibson v. Berryhill, 411 U.S. 564 (1973) ... 8

In Re Murchison, 349 U.S. 133 (1955) ... 8

R. R. Yardmasters of America v. Harris, 721 F.2d 1332 (1983) ... 9

Withrow v. Larkin, 421 U.S. 35 (1975) ... 8

Statutes:

35 Pa. C.S.A. §691.5 ... 4

35 P.S. §§7511-7516 ... 9

35 P.S. §7513(b) ... 4

28 U.S.C. §1257(a) ... 3

Regulation:

25 Pa. Code §21.86 ... 7

IN THE

Supreme Court of the United States

October Term, 1989

No. _____

LAWRENCE COAL COMPANY,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

Lawrence Coal Company, petitioner in the action below, respectfully prays that a writ of certiorari issue to review the denial of allowance of appeal by the Pennsylvania Supreme Court filed on the 18th day of December, 1989.

Opinions Below

The order of the Pennsylvania Supreme Court denying the petitioner's petition for allowance of appeal is reproduced in Appendix "A". The memorandum opinion and order of the Commonwealth Court of Pennsylvania dated July 12, 1989 is reproduced in Appendix "B". The adjudication of the Environmental Hearing Board by Robert D. Myers, Member, dated July 5, 1988 is reproduced in Appendix "C". The opinion and order of the Commonwealth Court of Pennsylvania (unreported) dated January 25, 1988, is reproduced as Appendix "D". The adjudication of Environmental Hearing Board by Maxine Woelfling dated May 27, 1986, is reproduced as Appendix "E".

Jurisdiction

The denial of the petitioner's petition for allowance of appeal to the Pennsylvania Supreme Court was filed on December 18, 1989. This petition was filed within 90 days. The jurisdiction of this Court is founded upon 28 U.S.C. §1257(a) (1989).

Statement of the Case

Respondent, Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter "DER"), seeks civil penalties pursuant to Section 605 of the Clean Streams Law against surface coal operator Lawrence Coal Company (hereinafter "Lawrence"). 35 Pa. Cons. Stat. Ann. §691.5 (Purdon 1977 and Supp. 1989).

The events which are pertinent are as follows:

The Chairman of the Environmental Hearing Board (hereinafter "Board"), Dennis J. Harnish, presided over 11 days of hearings which concluded on November 23, 1982.[1]

The bulk of the testimony centered around Lawrence's responsibility for several off-site discharges along a township road adjacent to the mining site.

Harnish resigned from the Board in May of 1983 without having prepared an adjudication. (Appendix "E" at p. 63a).

The case was later assigned by the Board to Hearing Examiner Edward Casey for preparation of a proposed adjudication. After review of the case, Casey wrote a letter to both counsel indicating that he made certain findings and recommended settlement of the case for the sum of $1,000. (Appendix "C" at p. 11a).

The DER then petitioned to remove Casey based upon *ex parte* unverified communications between the DER and former Chairman Dennis Harnish. (Appendix "E" at p. 63a). The Board granted the DER's petition for recusal.

---

[1] The Board, an administrative tribunal consisting of five members, has *inter alia* jurisdiction to determine civil penalties in surface mine operations. 35 P.S. §7513(b) (Purdon 1977 and Supp. 1989).

After the Board granted the DER's petition for recusal, Lawrence petitioned for recusal of the Board because its decision was based upon unverified *ex part* conversations between the DER and Harnish. The Board held that "an indicia of conflict could be perceived from the disclosures made by Harnish to DER counsel, and the Board thought it in the best interest of all concerned that the members of the Board not involved in the unfortunate incident reserve unto themselves the final determination of the controversy." (Appendix "D" at p. 57a).

On May 27, 1986, three and one half years after the testimony had concluded, an adjudication was handed down by the remaining two members of the Board, Chairman Maxine Woelfling and Edward Gerjuoy. The adjudication found against Lawrence on all major points and assessed $150,700 in penalties. (Appendix "F" at p. 64a).

Lawrence, upon receiving notice that Woelfling had participated in the determination, filed a petition for recusal of Woelfling and Gerjuoy. (Appendix "C" at p. 12a). It was determined that Woelfling had been associated with the subject case in her position as an attorney for the DER for 11 years. The petition was denied and the adjudication of May 27, 1986, of the Board was affirmed without modification. (Appendix "C" at p. 12a).

In Lawrence's appeal to the Commonwealth Court, the Court held the case was "so tarnished as to create a clear susceptibility to potential bias against Lawrence" and that "... the possibility of unfairness to Lawrence exists and improprieties might have occurred." (Appendix "D"). The case was remanded for a new adjudication based upon the record already established. (Appendix "D").

The only remaining member of the Board, Robert Myers,[2] again found in favor of the DER on all major issues and assessed civil penalties in the amount of $104,050. (Appendix "E").

Lawrence's appeal to the Commonwealth Court was denied by a three judge panel with one judge abstaining and the other joining only in the result. (Appendix "B"). Lawrence's petition for allowance of appeal was denied before the Supreme Court without opinion.

---

[2] The Commonwealth Court, in its first opinion, held that the two other members of the Board could not participate in the decision. Myers made findings of fact and conclusions of law substantially the same as the Board had in its previous tarnished adjudication, but reduced the damages by $50,000.

REASONS FOR GRANTING THE WRIT

DUE PROCESS IS NOT COMPLIED WITH NOR IS THE APPEARANCE OF BIAS EXPUNGED BY PERMITTING ONE MEMBER OF A THREE MEMBER ADMINISTRATIVE AGENCY TO MAKE A DETERMINATION WHEN THE OTHER TWO MEMBERS HAVE BEEN JUDICIALLY DISQUALIFIED.

There can be no question that the proceedings in this case have created the appearance of impropriety:

> The hearing officer originally appointed by the Board made a recommendation the case be settled for $1,000.
>
> That hearing officer was recused without a hearing, pursuant to the DER's request, on the basis of an unverified *ex parte* communication between the DER and the former Chairman of the Environmental Hearing Board.
>
> The subsequent adjudication was rendered against Lawrence in the amount of $150,700 was authored by the current Chairman of the Environmental Hearing Board who, at the time the complaint was initially filed against Lawrence by the DER, had been an employee of the DER and had reviewed the matter as part of her position with the DER.
>
> After a determination by the appellate court that the case was tarnished by the above events, and in violation of the statute and the Board's own rules, one member of the three member Board[3], without

[3] The Board's own rules provide that determinations are to be made by a majority of the Board after a hearing. 25 Pa.Code §21.86 (1990).

> hearing any testimony, rendered a decision substantially similar to the original tainted adjudication.[4]

It has long been recognized by this Court that "[a] fair trial and a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). This requirement applies to administrative agencies as well as to the courts. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). The courts have recognized not only that a biased decisionmaker is unconstitutional but also that the constitution seeks ". . . to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. at 136. This Court has relied upon experience and common sense in determining when the probability of actual bias on the part of the decision maker is too severe to be constitutionally appropriate. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

From a practical standpoint, the dilemma facing Myers in making his adjudication was obvious. As the newest Board member, Meyers was asked to decide a case which three of his predecessors, two of whom were current Board members, had previously decided against Lawrence. He was placed in an impossible position. To decide contrary to the prior decision of his colleagues would be a public betrayal. The appearance of impropriety is obvious and compelled by logic and practicality, both of which are standards recognized by this Court. *Withrow v. Larkin, supra* at 47.

---

[4] A cursory examination of the adjudication of Myers indicates his obvious bias. This complicated case, which concerned off-site alleged acid mine drainage, was based entirely upon circumstantial evidence. Every crucial point was disputed and although the burden of proof was on the DER, Myers stated in his adjudication, that it was not necessary for him to reach sensible conclusions from the DER's evidence because Lawrence failed to address several important points in the case. (Appendix "C" at 41a-42a). This statement is completely contrary to the rule as to burden of proof recognized by both sides which placed the burden on the DER.

The Environmental Hearing Board is a quasi-judicial agency. 35 P.S. §§7511-7516. This is not a situation where the statute or the Board's own rules permit the delegation of determinations to a minority member. *E.g., R. R. Yardmasters of America v. Harris,* 721 F.2d 1332, 1340 (1983). Both the statute and its own rules require the Board to speak through a majority of its members. *Id.*; 25 Pa.Code §21.86. Even assuming that the Board followed the common law rule that a quorum of a majority of a question is required to participate, *FTC v. Flotill Products, Inc.,* 389 U.S. 179 (1967), neither a quorum nor a majority of that quorum made the determination in this matter.

This Court has never determined the issue of whether disqualification of a majority of the members of a tribunal due to the appearance of impropriety constitutionally requires that the remedy be dismissal of the complaint. However, some courts have previously dismissed cases where the appearance of impropriety has risen to a constitutional level due to irreparable prejudice and long delay. *E.g., Gardner v. Repasky,* 434 Pa. 126, 130, 252 A.2d 704, 706 (1969).

In view of the standards established by this Court regarding due process: (1) that a biased decision maker is unconstitutional; (2) that the constitution has endeavored to prevent even the probability of unfairness; (3) and that experience and common sense are to be used in determining when the offenses rise to the level of violations of constitutional due process, certiorari should be granted with regard to this issue of first impression before the court.

Conclusion.

A writ of certiorari should be issued to review the judgment of the Pennsylvania Supreme Court so as to determine if due process infraction has been violated when a minority member of a three member tribunal renders a determination in violation of both state statute and administrative rules in a case already tarnished by the appearance of impropriety.

Respectfully submitted,

WILLIAM M. RADCLIFFE, ESQ.
Counsel of Record
LOUISE D. MONAGHAN, ESQ.
COLDREN, ADAMS, DEHAAS
& RADCLIFFE
700 Gallatin Bank Building
Post Office Box 1327
Uniontown, Pennsylvania 15401
412-437-2711

APPENDIX "A"

Petition for Allowance of Appeal
Dated December 19, 1989.

SEAL

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PROTHONOTARY
IRMA T. GARDNER
DEPUTY PROTHONOTARY

801 City-County Building
Pittsburgh, Pa.
15219
(412) 565-2816

December 19, 1989

Ira B. Coldren, Jr., Esquire
Louis D. Monaghan, Esquire
Coldren, Adams, DeHaas & Radcliffe
700 Gallatin Bank Building
P. O. Box 1327
Uniontown, Pa. 15401

In Re: Lawrence Coal Co. v. Dept. of Environmental Resources No. 457 W. D. Allocatur Docket 1989

Gentlemen:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above matter:

"December 18, 1989
Petition Denied
Per Curiam"

Very truly yours,
IRMA T. GARDNER
DEPUTY PROTHONOTARY

ITG:cho
cc: Diana J. Stares, Esq.
Hon. Jacob Kalish

APPENDIX "B"

Memorandum Opinion and Order of the Commonwealth Court of Pennsylvania Dated July 12, 1989.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 1891 C.D. 1988

LAWRENCE COAL COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
RESOURCES,
Respondent.

BEFORE: HONORABLE DAVID W. CRAIG, *Judge*
HONORABLE JOSEPH T. DOYLE, *Judge*
HONORABLE JACOB KALISH, *Senior Judge*

ARGUED: May 4, 1988

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KALISH FILED: July 12, 1989

Lawrence Coal Company (Lawrence) petitions for review of a decision of the Environmental Hearing Board (Board), which assessed civil penalties against Lawrence for certain violations.

On November 20, 1987, this court remanded this matter to the Board for a new hearing and a new decision on the basis of a 1982 record and any associated briefs and papers filed by the parties.

The basis for this remand was that upon consideration of the proceedings, the matter was so tarnished as to create a clear susceptibility to potential bias against Lawrence. Additionally, the possibility of unfairness to Lawrence existed and improprieties may have occurred.

At the remand hearing, Robert Myers, recently appointed as a Board member, heard the matter and assessed civil penalties of $104,500 against Lawrence, which now petitions this court for review. We Affirm.

Lawrence contends that the proceedings were so irreparably tainted that a remand based on the previously-made record was not curable. It is further contended by Lawrence that the Board's findings are not based on substantial evidence. In the previous appeal, this court did consider the question of taint, and while recognizing that the proceedings at least had the appearance of impropriety, nevertheless did not find that the evidence itself was tainted. Therefore, the matter was remanded for an administrative hearing based on the record previously made. Because the parties have previously litigated the issue of taint before this court, it is now res judicata, since parties are the same and the same issue is involved. They are barred from relitigating the issue.

Lawrence now contends that Myers was not a Board member at the time of the original hearings, the procedure for the conduct of hearings before the Board was not followed, and that in any event, the findings are not based on substantial evidence.

Our scope of review is limited to determining whether the Board committed constitutional violations, errors of law, or whether any necessary fingings are unsupported by substantial evidence. *Pennsylvania Game Commission v. Department of Environmental Resources*, 97 Pa. Commonwealth Ct. 78, 509 A.2d 877 (1986), *aff'd* _____ Pa. _____, 555 A.2d 812 (1989).

Our legislature vested in the Department of Environmental Resources (DER) the implementation of the policy of our state, namely, "[T]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." Pa. Const. art. I, §27. An administrative agency has wide discretion in performing its administrative duties, including promulgating rules, regulations, and standards, and the Commonwealth Court will not interfere with the exercise of such discretion, absent proof of fraud, bad faith or blatant abuse of discretion.. *Haycock Township v. Department of Environmental Resources*, 108 Pa. Commonwealth Ct. 466, 530 A.2d 514 (1987), *petition for allowance of appeal denied*, 518 Pa. 656, 544 A.2d 1343 (1988).

Section 21.86 of DER regulations, 25 Pa.Code §21.86, reads in pertinent part as follows:

> (a) Hearings may be held at the discretion of the Board, before the Board as a whole, by individual Board members sitting as hearing examiners or by hearing examiners who are not members of the Board. Hearings held by hearing examiners not members of the Board will be decided by the Board upon its review of the record and the examiner's proposed adjudication.

In *McIntire Co. v. Department of Environmental Resources*, 108 Pa. Commonwealth Ct. 443, 530 A.2d 140 (1987), *petition for allowance of appeal denied*, 518 Pa.

614, 540 A.2d 536 (1988), the hearing examiner was not a member of the Board at the time the adjudication was rendered. In that case we held:

> [W]e refuse to read into the regulation a requirement that a Board member sitting as a hearing examiner must be a current member at the time of adjudication. . . . [D]ue process does not require that administrative adjudicators be present at a hearing but only that they review the record in preparing their decisions.

Id. at 453, 530 A.2d at 145; *Caldwell v. Clearfield County Children and Youth Services*, 83 Pa. Commonwealth Ct. 49, 476 A.2d 996 (1984). Furthermore, administrative adjudicators are not precluded from determining credibility of witnesses from the reading of a transcript. *Caldwell.*

There is a prima-facie presumption that the adjudicator read the record and there is nothing in the record to overcome this regularity of his acts. *See Mignatti Construction Co. v. Environmental Hearing Board*, 49 Pa. Commonwealth Ct. 497, 411 A.2d 860 (1980).

Lawrence had a strip-mining permit for its operation, the Rogers Mill Strip. Located uphill from the Rogers Mill Strip is a strip known as the Chanin Strip operated by the Marsolino Coal and Coke Mining Company, fronting along Pirl Spring Road. Pirl Spring Road contains culverts which carry water under the road toward the Buck Run Tributary and Buck Run.

The Board found that at several of the culverts the discharge was acid mine drainage. The Board found that stream degradation is solely attributable to the mining activities of Lawrence and Marsolino and held Lawrence responsible for the drainage discharge into the Commonwealth waters.

Lawrence contends that this finding is not based on substantial evidence. Lawrence asserts that the drainage did not come solely from its mining operations, and that therefore the causal relationship of the drainage from Lawrence was not proven. Furthermore, it is asserted that Marsolino was responsible for the acid drainage, and that Lawrence was responsible for only a few isolated instances.

In *Commonwealth v. Harmar Coal Co.*, 452 Pa. 77, 306 A.2d 308 (1973), *appeal dismissed*, 415 U.S. 903 (1974), our Supreme Court reviewed the legislative history of The Clean Streams Law (Law), Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§691.1-691.702, and the applicable court decisions. The critical and principal conduct prohibited by the Law is water pollution. It was concluded that in view of the Law's objective not only to prevent further pollution of the waters of the Commonwealth, but also to eliminate existing water pollution, it is the fact of mine drainage discharge into the surface waters which is critical, rather than identification of the original source of the polluted waters. Discharge must be authorized by the Board's rules and regulations. "Mine drainage" consists of waters which have been polluted by operation of a mine, and includes "fugitive mine water," that is, water which enters a particular mine by gravity or pressure.

Also, section 315 of the Law, 35 P.S. §315, provides that no person shall operate a mine or allow a discharge from a mine. Thus, while Lawrence may not be responsible for actually causing the pollution, it certainly harms the Commonwealth by discharging the polluted water into the surface waters. There is nothing in the record to indicate that Lawrence has the right to discharge acid mine drainage into the waters of the

Commonwealth. The Clean Streams Law applies to *all* discharges of mine drainage. *Harmar*. The fact that the condition arises from the activities of another mine does not affect the appropriateness of invoking the police power to dispel the immediate dangerous condition. *Commonwealth v. Barnes and Tucker Co.*, 472 Pa. 115, 371 A.2d 461 (1977).

Substantial evidence, albeit circumstantial, establishes clearly and logically a link between the discharge from the other mines and the acid mine drainage from Lawrence.

There was evidence of the tracing of the flow of the drainage from the Rogers Mill Strip. There was evidence of the groundwater flow pattern at the mine in topographical and structural designs and controls. The mine forms a hillside and the groundwater penetrating the mine at the higher level would tend to flow downhill, discharging at the lower level in the vicinity of Pirl Spring Road. The structural controls would direct the drainage toward the culverts, and a portion of the acid mine drainage from the Rogers Mill Strip traveled along the pavement of the mined coal seam.

The record shows that the discharges of acid drainage, rather that an isolated instance, occurred on eleven separate days within a ten-month period. It was deliberate and willful on the part of Lawrence not to treat the drainage system after having been directed to comply for a period of two and a half years.

Thus, the penalty imposed was proper, and we affirm.

JACOB KALISH
Jacob Kalish, *Senior Judge*

Judge Doyle concurs in the result only.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 1891 C.D. 1988

LAWRENCE COAL COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
RESOURCES,
Respondent.

O R D E R

NOW, July 12, 1989, the decision of the Environmental Hearing Board, No. 81-021-CP-M, is affirmed.

JACOB KALISH
Jacob Kalish, *Senior Judge*

CERTIFIED FROM THE RECORD
AND ORDER EXIT

Jul 12, 1989

C.R. HOSTUTLER
Deputy Prothonotary—Chief Clerk

APPENDIX "C"

Adjudication of the Environmental Hearing Board by Robert D. Myers, Dated July 5, 1988.

SEAL

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three—Five
Harrisburg, PA. 17101

(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

EHB Docket No. 81-021-CP-M

Issued: July 5, 1988

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
RESOURCES

v.

LAWRENCE COAL COMPANY

A D J U D I C A T I O N

By the Board

Synopsis

This proceeding involves a Complaint for Civil Penalties filed by the Department of Environmental Resources (DER) against Lawrence Coal Company

(Lawrence) under Section 605 of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605. DER sustained its burden of proving by a preponderance of the evidence that Lawrence had violated provisions of the CSL, provisions of DER's regulations, and provisions of its mine drainage permits by discharges of acid mine drainage (AMD) and sediment at two surface mining sites in Fayette County, and by the improper handling of reject material at one of the sites. The unlawful discharges were shown to have degraded Buck Run (a high quality cold water fishery) and to have interfered with its use as a fishing stream.

In determining the amount of a civil penalty, the Board considered wilfullness and the damage to Buck Run. It did not consider the cost of restoration or employ a deterrence factor because of insufficient evidence.

PROCEDURAL HISTORY

On February 25, 1981, DER filed a Complaint for Civil Penalties against Lawrence, alleging (1) the discharge of acid mine drainage, (2) the failure to implement and maintain effective erosion and sedimentation controls, (3) the failure to properly dispose of toxic waste, and (4) the disturbing of land designated as a barrier. The allegations pertained to Lawrence's surface mining operations under Mining Permit No. 1063-5 in Springfield Township, Fayette County, and under Mining Permits Nos. 1063-7 and 1063-8 in Dunbar Township, Fayette County, during 1980 and the early months of 1981.

On March 16, 1981, Lawrence filed an Answer denying the allegations of the Complaint, alleging in New Matter that it had attempted in good faith to cooperate with DER in determining the cause of the alleged pollution of

the waters of the Commonwealth. DER filed a Reply to this New Matter on April 1, 1981, denying the allegations.

Hearings began before Board Chairman Dennis J. Harnish in Pittsburgh on June 2, 1981. At that time it was stipulated that the Complaint did not include any alleged violations with respect to Mining Permit No. 1063-5A. DER filed on July 6, 1981, an Application for Leave to Amend Complaint to include Mining Permit No. 1063-5A, to which Lawrence objected in an Answer filed on July 19, 1981. Chairman Harnish denied DER's Application at the outset of the hearing on July 26, 1981.

A total of eleven days of hearings were held before they concluded on November 23, 1982. By agreement of counsel, the deposition of Donald L. Streib, dated January 21, 1983, together with exhibits, was filed as part of the record on January 31, 1983. Post-hearing briefs were filed by both parties during March 1983. On March 28, 1983, DER filed a Motion to Amend Complaint to Conform to Proof. Lawrence filed an Answer to the Motion on April 7, 1983.

Chairman Harnish resigned from the Board on May 16, 1983, without having prepared an Adjudication. The case was assigned to Edward R. Casey, a Board-appointed Hearing Examiner, who began reviewing the record on September 15, 1983. On October 20, 1983, Mr. Casey wrote a letter to legal counsel for both parties, setting forth his candid overview of the case and suggesting a settlement that would involve the assessment of civil penalties in the maximum amount of $1,000.

On November 7, 1983, DER filed a Petition for Recusal of Mr. Casey and a Motion for Reassignment, alleging, *inter alia*, that Mr. Casey had ignored a recommendation

of former Board Chairman Harnish to find in favor of DER. On November 22, 1983, the Board entered an Order recusing Mr. Casey and reassigning the case to Board Member Anthony J. Mazullo, Jr. for the purpose of preparing an Adjudication.

On November 30, 1983, Lawrence filed a Petition, requesting either a dismissal of the case because of alleged improper communications between former Board Chairman Harnish and legal counsel for DER or, in the alternative, a reassignment of the case to a neutral hearing examiner who was not involved with the Board during Harnish's tenure. The Petition was denied in an Opinion and Order issued by the Board (Members Mazullo and Edward Gerjuoy) on December 12, 1983.

Board Member Mazullo prepared a draft Adjudication which had not been adopted by the Board at the time of his resignation on January 31, 1986. On May 27, 1986, the Board (acting through its remaining incumbents, Chairman Maxine Woelfling and Member Gerjuoy) issued an Adjudication, which adopted Mazullo's draft Adjudication with certain modifications and which assessed civil penalties in the amount of $150,700.

On June 6, 1986, Lawrence filed a Petition for Reconsideration. As supplemented on June 24, 1986, the Petition requested that the Adjudication of May 27, 1986, be vacated and that Chairman Woelfling and Member Gerjuoy be recused from any further participation in the case. William A. Roth became a Member of the Board on June 24, 1986. On August 7, 1986, the Board informed the parties that Members Gerjuoy and Roth would decide whether Chairman Woelfling should be recused.

On September 12, 1986, the Board (Members Gerjuoy and Roth) issued an Opinion and Order deferring a decision on the recusal of Chairman Woelfling until Gerjuoy and Roth acted on Lawrence's Petition for Reconsideration. On September 19, 1986, the Board (Members Gerjuoy and Roth) issued on Opinion and Order denying the Petition for Reconsideration and dismissing as moot the request for the recusal of Chairman Woelfling.

Lawrence filed with Commonwealth Court (No. 3062 C.D. 1986) on October 16, 1986, a Petition for Review of the Board's Orders of September 19, 1986, and May 27, 1986. Commonwealth Court handed down a Memorandum Opinion and Order on January 25, 1988, vacating the Board's Orders and remanding the case for new hearings. On April 8, 1988, the Order was amended to provide for a new Adjudication, to be issued within 90 days, on the basis of the 1982 record and associated briefs and papers, and without the participation of Chairman Woelfling and Member Roth. (Board Member Gerjuoy had left the Board in 1987 and had been succeeded by Robert D. Myers.)

The record consists of the pleadings, a transcript of 1914 pages, a deposition of 54 pages and 118 exhibits.

FINDINGS OF FACT

1. DER is an administrative department of the Commonwealth of Pennsylvania, and is responsible for administering the provisions of the CSL and the rules and regulations adopted pursuant thereto. (Complaint, Para.1; 71 P.S. §61)

2. Lawrence is a company engaged in the surface mining of coal at sites in Springfield and Dunbar Townships, Fayette County. (Complaint Para. 2 and 3)

3. Lawrence's surface mining operation in Springfield Township is the Rogers Mill Strip. (N.T. 10)

4. Mine Drainage Permit No. 3376SM15 (MDP), which pertains to the Rogers Mill Strip, was issued by DER to William K. Tedesco on November 10, 1976, and was transferred to Lawrence on July 19, 1977. (N.T. 11)

5. Mining Permit No. 1063-5 (MP5), covering 63 acres of the Rogers Mill Strip, was issued by DER to Lawrence on July 1, 1977. (N.T. 11-12)

6. Mining Permit No. 1063-5A (MP5A), covering an additional 20.4 acres of the Rogers Mill Strip, was issued by DER to Lawrence on July 29, 1977. (N.T. 11-12)

7. Mining Permit No. 1063-7 (MP7) and Mine Drainage Permit No. 3374SM31T both pertain to a surface mining operation conducted by Lawrence at the Kennedy Strip in Dunbar Township. (Complaint Para. 4; N.T. 275)

8. Mining Permit No. 1063-8 (MP8) and Mine Drainage Permit No. 3378BC10 both pertain to a surface mining operation conducted by Lawrence on the Spruell Strip in Dunbar Township. (Complaint Para. 4; N.T. 264)

9. The Rogers Mill Strip lies east of the junction of T-683 (Pirl Spring Road) with T-687 (Fish Hatchery Road). Fish Hatchery Road runs in a northeasterly-southwesterly direction and forms the western boundary of MP5A. Pirl Spring Road runs in a northwesterly-southeasterly direction and forms the southwestern boundary of MP5. T-685 (Haul Road) runs in a general easterly direction from Pirl Spring Road (about 250 feet away from the junction with the Fish Hatchery Road), crosses the Rogers Mill Strip and forms the dividing line between MP5 and MP5A. (N.T. 21-24; Commonwealth Exhibit (CX) 1)

10. Topographically, the Rogers Mill Strip descends about 500 feet from the southeast to the northwest with a slight ridge or "tongue" extending through the center. Drainage from the Strip flows southwest toward Buck Run and northeast toward Middle Fork. (N.T. 13, 720-721; CX 1)

11. Also located in the Buck Run watershed is a surface mining operation, conducted by Marsalino Coal & Coke, Inc. (Marsalino) pursuant to Mining Permit No. 71-27 on the Chanin Strip, upgradient from and immediately to the south of, the Rogers Mill Strip. (N.T. 17-18; CX 1)

12. The Rogers Mill Strip and the Chanin Strip are the only current mining operations in the Buck Run watershed. (N.T. 18)

13. In prior years, deep mining had been conducted beneath both the Rogers Mill Strip and the Chanin Strip, and surface mining had been conducted on the Rogers Mill Strip by William K. Tedesco, Lawrence's predecessor. (N.T. 606-610, 750-757, 918, 1377-1378, 1392-1393)

14. Buck Run flows in a northerly direction west of the Pirl Spring Road, but veers toward the west near the junction of the Pirl Spring Road with the Fish Hatchery Road, running beneath the latter at the Rogers Mill Bridge. About 700 feet upstream from this bridge, Buck Run divides into two branches which rejoin after a distance of about 500 feet. An unnamed tributary flows west of Pirl Spring Road and empties into the easterly branch of Buck Run about 150 feet upstream from its junction with the westerly branch. (N.T. 13, 86, 104-107; CX 1)

15. Buck Run has been classified as a cold water fishery and was stocked with trout by the Pennsylvania Fish Commission from 1976 through 1978. (N.T. 14, 1837, 1853)

16. The Rogers Mill Strip and the Chanin Strip are situated on the northwestern flank of the Laurel Ridge anticline. Both Strips are geologically similar, characterized by moderately steeply dipping sedimentary rock. The main coal seam (the seam mined by both Marsalino and Lawrence) strikes North 30° East and dips to the northwest. It is overlain with 50 to 60 feet of sandstone. A rider seam lies below the main seam, separated from it by 40 to 60 feet of sandstone and shale. (N.T. 712-713, 731-735, 790-791, 1326-1327)

17. In the vicinity of the Haul Road, a roll occurs in the main seam, causing it to flatten considerably while still dipping to the northwest. (N.T. 735)

18. The main seam outcrops on the southwestern portions of the Rogers Mill Strip and the Chanin Strip along a line that runs roughly parallel to, and about 400 feet away from, Pirl Spring Road. The outcrop line then swings toward the north on the Rogers Mill Strip and runs parallel to, and about 150 feet away from, Fish Hatchery Road. (CX 1; Defendant's Exhibit (DX) 4)

19. The rider seam outcrops at Pirl Spring Road. (DX 4)

20. Groundwater penetrating the surface at the higher elevations would tend to flow in a northwesterly direction, discharging at the lower elevation in the vicinity of Pirl Spring Road and Fish Hatchery Road. (N.T. 736-737)

21. Lawrence's MP5 pit was 1,000 feet to 1,200 feet long. The highwall was about 60 feet high and oriented in a general north-south direction. It was composed of highly fractured sandstone. The northern endwall was adjacent to the Haul Road and the southern endwall was next to the boundary line between the Rogers Mill Strip and the Chanin Strip. (N.T. 716-717, 720; CX1; CX 36; DX 4)

22. A series of ten culverts carry water under Pirl Spring Road to Buck Run and the unnamed tributary. The first five of these are adjacent to the MP5 portion of the Rogers Mill Strip and the remaining five are adjacent to the Chanin Strip. Culvert 1 (the farthest toward the northwest) and culvert 2 flow directly toward Buck Run. The others all flow toward the unnamed tributary. (N.T. 20, 39; CX 1)

23. On January 23, 1980, Mark Frederick, a Surface Mining Conservation Inspector for DER, observed discharges of water from culverts 1 through 5 and obtained samples for analysis. (N.T. 19-20)

24. Mr. Frederick determined the following sources for the flows at culverts 1 through 5:

culvert 1—sediment pond on MP5A (not relevant to this proceeding)

culvert 2—swampy area at toe of spoil on MP5

culvert 3—swampy area at toe of spoil on MP5

culvert 4—toe of spoil near dead tree on MP5

culvert 5—embarkment above ditch along Pirl Spring Road near boundary between Rogers Mill Strip and Chanin Strip. Since the precise source of the discharge could not be determined, Mr. Frederick was unable to decide whether Lawrence or Marsalino was responsible for it. (N.T. 24-25, 51-54, 64-66)

25. Marsalino had been cited by DER on July 31, 1979, for discharging AMD into Buck Run and its tributaries. Marsalino's discharges continued into 1980. (N.T. 317-325; DX 1)

26. The analysis of water samples obtained by Mr. Frederick on January 23, 1980, revealed that the discharges at culverts 2 through 5 exceeded the effluent limitations imposed by Lawrence's MDP and by DER's regulations, and constituted AMD. (N.T. 40-48)

27. Mr. Frederick recommended that Lawrence develop and implement a plan to collect and treat any substandard water leaving the Rogers Mill Strip and flowing toward Buck Run or the unnamed tributary. (N.T. 25)

28. Mr. Frederick inspected the Rogers Mill Strip on January 28, 1980, in the company of Archie Johnson, Lawrence's foreman. Mr. Frederick observed discharges of water from culverts 2 through 5 but did not obtain any samples. There was no treatment of the discharges but Mr. Johnson agreed to look into the feasibility of constructing a ditch to collect and divert water to a treatment basin. (N.T. 70-72)

29. Mr. Frederick inspected the Rogers Mill Strip on February 28, 1980, accompanied by James V. Filiaggi, Lawrence's Supervisor, Mr. Johnson, Mr. Frederick's immediate superior and another DER mine inspector. Mr. Frederick directed Lawrence to install the siltation (toe of spoil) ditch required by the MDP by March 30, 1980, and to construct it at a grade and depth adequate to collect both surface runoff and discharges of AMD. (N.T. 73-74)

30. The toe of spoil ditch was dug between May 27, 1980, and June 10, 1980, but was not deep enough or long enough to intercept all the water discharging at the culverts. Lawrence extended the ditch as far as the dividing line between the Rogers Mill Strip and the Chanin Strip by July 1, 1980. The ditch was dug in rubbly material and was not impermeable. (N.T. 170-171, 182,194, 851)

31. Water in the toe of spoil ditch was diverted to a sedimentation pond constructed by Lawrence between May 13, 1980, and June 12, 1980. A second sedimentation pond was in place by July 1, 1980. Discharges from the ponds flowed to culvert 2. (N.T. 132, 134, 182, 194, 1516)

32. After the toe of spoil ditch and the two sedimentation ponds had been constructed, the amount of water discharged at culverts 2, 3, and 4 decreased significantly. (N.T. 225, 238-239,489)

33. On October 10, 1980, Mr. Frederick suggested that Lawrence deepen the original section of the toe of spoil ditch in an effort to intercept seepage still reporting to culverts 3 and 4. (N.T. 252-254)

34. DER did not hold Lawrence responsible for treating the discharge at culvert 5 from January 23, 1980 to June 10, 1980, did hold Lawrence responsible from June 10, 1980, to July 1, 1980, did not hold Lawrence responsible from July 1, 1980 to September 10, 1980, and held Lawrence jointly responsible with Marsalino after September 10, 1980. (N.T. 168, 201-202, 249, 299-300)

35. Mr. Frederick also sampled the discharges at the Rogers Mill Strip on February 28, 1980, March 12, 1980, March 20-21, 1980, May 13, 1980, May 21, 1980, June

10, 1980, July 7, 1980, July 22-23, 1980, August 14, 1980, and October 3, 1980. (N.T. 74-79, 80, 82, 84, 90, 123, 131, 139, 147, 168-169, 171-172, 223-224, 226-227, 237-238, 245, 249)

36. Discharges at culvert 2:

(a) exceeded effluent limitations and constituted AMD on February 28, 1980, March 12, 1980, March 20-21, 1980, May 21, 1980, July 7, 1980, August 14, 1980, and October 3, 1980; (N.T. 74-79, 80, 82, 90, 148, 225, 239, 250; CX 33A)

(b) were being treated on May 13, 1980, June 10, 1980, July 1-2, 1980, and July 22-23, 1980. Ph and acidity levels may have been within effluent limitations on these dates, but metal concentrations exceeded effluent limitations. (N.T. 133, 173, 201, 227, 237; CX 33A)

37. Discharges at culvert 3:

(a) exceeded effluent limitations and constituted AMD on February 28, 1980, March 12, 1980, March 20-21, 1980, May 21, 1980, August 14, 1980, and October 3, 1980; (N.T. 74-79, 80, 82, 90, 148, 238, 250; CX 33A)

(b) were being treated on May 13, 1980, June 10, 1980, July 1-2, 1980, and July 22-23, 1980. Ph and acidity levels may have been within effluent limitations on these dates, but metal concentrations exceeded effluent limitations; (N.T. 133, 172, 201, 227, 234; CX 33A)

(c) were not sufficient to take laboratory samples on July 7, 1980, and August 14, 1980; (N.T. 224, 238)

38. Discharges at culvert 4:

(a) exceeded effluent limitations and constituted AMD on February 28, 1980, March 12, 1980, March 20-21, 1980, May 21, 1980, June 10, 1980, July 7, 1980, August 14, 1980, and October 3, 1980; (N.T. 74-79, 80, 82, 90, 148, 172, 225, 238, 250; CX 33A)

(b) were being treated on May 13, 1980, July 1-2, 1980, and July 22-23, 1980. Ph and acidity levels may have been within effluent limitations on these dates, but metal concentrations exceeded effluent limitations; (N.T. 132, 201, 227; CX 33A)

(c) were not sufficient to take a laboratory sample on July 7, 1980. (N.T. 224)

39. During the periods when DER considered Lawrence wholly or partly responsible for the discharges at culvert 5, such discharges:

(a) were not being treated on June 12, 1980; (N.T. 182)

(b) were being treated on July 1, 1980, but not for the removal of metals; (N.T. 198)

(c) exceeded effluent limitations and constituted AMD on October 3, 1980. (N.T. 250)

40. The only method employed by Lawrence to neutralize the discharges involved the placement in the culverts of burlap bags filled with sodium carbonate briquettes. This treatment did not remove metals or solids. (N.T. 116-117, 134, 224, 602)

41. The toe of spoil ditch and the sedimentation ponds constructed by Lawrence on MP5 provided a facility for the removal of metals and solids from water intercepted by the ditch; but no similar treatment was administered to the water that continued to discharge at culverts 2 through 5. (N.T. 171, 181, 222-223, 227, 256)

42. Karl K. Shaeffer, a Water Pollution Biologist for DER, performed a macro invertebrate study of Buck Run adjacent to the Rogers Mill Strip and Chanin Strip on March 20, 1980. This type of study attempts to measure the quality of a stream as a fishery by observing the insects resident in the stream. (N.T. 85-89, 388, 392) The March 20, 1980, study disclosed:

(a) that Buck Run met the requirements for a high quality cold water fishery upstream from a haul road built by Marsalino in conjunction with the Chanin Strip operation; (N.T. 402, 406-407)

(b) that Buck Run was somewhat degraded below Marsalino's haul road to the point where the unnamed tributary enters the stream, but still met the requirements for a high quality cold water fishery; (N.T. 402, 407, 409)

(c) that Buck Run below the point where the unnamed tributary enters the stream was degraded to the extent that the macro invertibrate community was nonexistent. Siltation and metal deposition on the substrate were readily observable; (N.T. 402, 407)

(d) that the metal deposition observable in Buck Run is typical of what occurs when AMD enters a stream and undergoes a certain amount of neutralization. (N.T. 408)

43. Karl K. Shaeffer conducted an electrofishing survey of Buck Run adjacent to the Rogers Mill Strip and Chanin Strip on October 3, 1980. This type of study attempts to measure the quality of a stream as a fishery by stunning the fish, counting them, and identifying them by species and size. (N.T. 411-414) The October 3, 1980, survey disclosed:

(a) that 75 brook trout of varying sizes, as well as some other associated cold water species, were found in that part of Buck Run immediately above the Marsalino haul road; (N.T. 417)

(b) that 3 brook trout were found in that part of Buck Run immediately above the Rogers Mill Bridge; (N.T. 416)

(c) that the fish community in Buck Run below the confluence with the unnamed tributary had been almost completely devastated; (N.T. 419)

(d) that Buck Run below the confluence with the unnamed tributary was affected by AMD, siltation and metal deposition, all of which is harmful to fish life; (N.T. 430-432, 436-438)

(e) that surface mining operations were the cause of the conditions in Buck Run below the confluence with the unnamed tributary. (N.T. 438-439)

44. The water in the Pirl Spring and the water discharging at culverts 7, 8, 9 and 10 are unaffected by surface mining on the Rogers Mill Strip and Chanin Strip, and represent background water quality for Buck Run. This water had a P_h between 5 and 6; alkalinites are usually between 10 and 20 parts per million (ppm); acidities are usually less than 10 ppm; iron, maganese, and aluminum are all under 1 pmm. It does not constitute AMD. (N.T. 497-500, 759-761, 1612)

45. The background water quality of Buck Run is such that the stream has little or no capacity to handle AMD. (N.T. 499, 761)

46. Observations and water samplings of Buck Run and the unnamed tributary on May 12, 1980, established:

(a) that Buck Run was slightly turbid, somewhat more alkaline and contained a higher concentration of iron below the confluence with the unnamed tributary; (N.T. 118-119; CX 33A)

(b) that Buck Run below the confluence with the unnamed tributary became highly polluted with silt and iron after a heavy rain shower; (N.T. 120-121; CX 33A)

(c) that the unnamed tributary reflected increases in alkalinity and iron as it flowed past the Rogers Mill Strip and Chanin Strip toward Buck Run; (N.T. 110-115; CX 33A)

(d) that the unnamed tributary near its confluence with Buck Run was discolored and reflected metal deposition; (N.T. 115)

(e) that both Marsalino and Lawrence were treating discharges with sodium carbonate briquettes on that day, accounting for the increases in alkalinity in the unnamed tributary and Buck Run; (N.T. 115-116)

(f) that neither Marsalino nor Lawrence was using any facilities for the removal of solids on that day, accounting for the increases in iron and turbidity in the unnamed tributary and Buck Run. (N.T. 116)

47. Observations and water samplings of Buck Run and the unnamed tributary on May 13, 1980, established:

(a) that both Marsalino and Lawrence were treating discharges with sodium carbonate briquettes on that day; (N.T. 130, 132; CX 33A)

(b) that neither Marsalino nor Lawrence was using any facilities for the removal of solids on that day; (N.T. 130, 132; CX 33A)

(c) that the eastern branch of Buck Run below the confluence with the unnamed tributary had a yellowish appearance and metal deposition, but the western branch was very clear; (N.T. 135; CX 33A)

(d) that the condition of the eastern branch of Buck Run was caused by the inadequate treatment of the discharges from the Rogers Mill Strip and the Chanin Strip. (N.T. 135; CX 33A)

48. Observations and water samplings of Buck Run and the unnamed tributary on May 21, 1980, established:

(a) that both branches of Buck Run above the confluence with the unnamed tributary were clear and had no signs of metal deposition; (N.T. 160; CX 33A)

(b) that the eastern branch of Buck Run below the confluence with the unnamed tributary was slightly turbid and had metal deposition; (N.T. 160; CX 33A)

(c) that Buck Run below the joinder of the two branches was slightly cloudy and had metal deposition. (N.T. 161; CX 33A)

49. Observations and stream samplings of Buck Run and the unnamed tributary on June 10, 1980, established:

(a) that both branches of Buck Run above the confluence with the unnamed tributary were very clear; (N.T. 175; CX 33A)

(b) that the eastern branch of Buck Run below the confluence with the unnamed tributary was slightly turbid; (N.T. 175; CX 33A)

(c) that the unnamed tributary at its mouth was turbid and alkaline. (N.T. 175, CX 33A)

50. On July 1-2, 1980, the eastern branch of Buck Run was clear above the confluence with the unnamed tributary and turbid below it. (N.T. 200, 209-213, CX 14C-CX 14H)

51. On July 22-23, 1980, silt deposits were in the unnamed tributary and in Buck Run below the confluence with the unnamed tributary. (N.T. 233)

52. Observations and water samplings established that Lawrence's discharges into Buck Run and the unnamed tributary exceeded effluent limitations for the total suspended solids on March 20, 1980, May 12-13, 1980, May 21, 1980, June 10, 1980, July 1-2, 1980, and July 22-23, 1980. (N.T. 90, 96-123, 125-135, 151-161, 172-179, 198-199, 209-223, 233-237; CX 8; CX 9; CX 10; CX 14C; CX 14D; CX 14E; CX 33A)

53. Buck Run (for a couple of miles below the unnamed tributary) and the unnamed tributary itself were degraded by the surface mining operations of both Lawrence and Marsalino. (N.T. 438-439, 461)

54. Lawrence's discharges, taken alone, or Marsalino's discharges, taken alone, were sufficient to degrade these waterways. Taken together, they had a cumulative effect. (N.T. 473-474)

55. The surface mining operations of Lawrence and Marsalino are the only apparent sources of AMD flowing into culverts 2 through 5. (N.T. 870-871)

56. The Pennsylvania Fish Commission ceased stocking Buck Run after the 1978 fishing season, primarily because of the AMD caused by Marsalino's operation on the Chanin Strip. At that time, there were no discerible discharges from the Rogers Mill Strip. (N.T. 555-557, 559-564, 1853)

57. From 1978 through 1981 there was little fishing done on Buck Run below the confluence with the unnamed tributary. (N.T. 1846-1848)

58. Samples of water in the toe of spoil ditch, taken on July 1-2, 1980, and July 22, 1980, had the characteristics of AMD and were similar in chemical composition to the water discharging at the culverts, with the exception of iron. Iron concentrations were higher in the ditch water than in the culvert water. (N.T. 241-245, 865-866, 1070-1072; CX 17A; CX 33A)

59. Lawrence's pit floor dipped, in part, toward Pirl Spring Road and, in part, toward Fish Hatchery Road. Initially, water flowed across the pit floor at a 45 degree angle away from the highwall and toward Pirl Spring Road. Later, it tended to flow toward the highwall and into the corner formed by the highwall and the northern endwall. (N.T. 260-263, 717)

60. Lawrence's pit floor water was analyzed in 1977, 1980, 1981 and 1982 and determined to be AMD. (N.T. 150, 1069; CX 18)

61. On May 13, 1980, Mr. Frederick informed Lawrence personnel that reject material was to be buried above the level of the pit floor to reduce the possibility of contaminating pit floor water. (N.T. 124-125, 375-380)

62. Lawrence continued to pile reject material on the pit floor on June 10, 1980, and on July 1-2, 1980. (N.T. 171, 219-220; CX 14P)

63. The surface mining of coal disturbs the normal flow of groundwater in the overburden. During and after the removal of coal, groundwater tends to penetrate to the pavement below the point where the coal seam was located and to discharge at the crop line. (N.T. 769-770)

64. Groundwater also may penetrate into the rock strata lying below the point where the coal seam was located. (N.T. 777)

65. Water flowing into the toe of spoil ditch and into culverts 2 through 5 represents both crop line discharges and discharges from below the crop line. (N.T. 782)

66. The roll in the main seam in the vicinity of the Haul Road diverts groundwater toward culvert 4 (at a point below the crop line of the main coal seam where a dead tree is the predominant landscape feature). This groundwater was intercepted by the toe of spoil ditch after it was constructed. (N.T. 798-799, 884-885)

67. Water that discharges into the toe of spoil ditch previously flowed off the Rogers Mill Strip and was affected by Lawrence's surface mining operations. (N.T. 801, 1029)

68. Water that continued to discharge into culverts 2, 3, 4, and 5 after construction of the toe of spoil ditch flowed off the Rogers Mill Strip, but may have had its source, in part, on the Chanin Strip. The water was affected both by Lawrence's and by Marsalino's surface mining operations. (N.T. 808-812, 1031-1036)

69. There is a hydrologic connection between water disturbed by Lawrence's surface mining operation on the Rogers Mill Strip and water discharged at culverts 2 through 5. (N.T. 487-494, 579-580, 782, 808-812, 838-844, 884-885, 1029-1036, 1633; CX 28)

70. Lawrence has acknowledged that some of the water that previously flowed to culvert 4 before construction of the toe of spoil ditch originated on the Rogers Mill Strip. (N.T. 487-488, 1162-1163, 1283, 1632-1633)

71. Lawrence has acknowledged that it never performed any analysis of the water discharging at culverts 2 through 5. (N.T. 1512-1513)

72. A study of Buck Run in 1981 and 1982 established:

(a) that fish and macro invertebrates were reestablished in that part of Buck Run below the confluence with the unnamed tributary; (N.T. 451-457, 1674-1676)

(b) that metal deposition still existed in that part of Buck Run below the confluence with the unnamed tributary, but that recovery was taking place; (N.T. 455)

(c) that the recovery of Buck Run was attributable directly to the reduction or elimination of discharges of AMD, silt and metals from the Rogers Mill Strip and the Chanin Strip; (N.T. 457)

(d) that, given the status quo, Buck Run will be completely restored in three to five years. (N.T. 460-461)

73. On September 4, 1980, Lawrence did not have a toe of spoil ditch on the Spruell Strip, had not constructed sedimentation ponds in accordance with plans approved by DER and was not providing separate

treatment in the sedimentation ponds. There was evidence of sediment runoff from the site into a tributary of Morgan Run. (N.T. 269-270, 274)

74. On September 4, 1980, Lawrence allowed a discharge of AMD to flow from the Spruell Strip into a tributary of Morgan Run. (N.T. 270, 274)

75. On September 15, 1980, Lawrence had spoils piled on the Kennedy Strip within several feet of Dickerson Run. (N.T. 275-276)

DISCUSSION

DER had brought this action under Section 605 of the CSL, 35 P.S. §691.605. During the time period covered by the alleged violations, Section 605 read, in pertinent part, as follows:

> "In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this act, rule, regulation, order of the department, or a condition of any permit issued pursuant to this act, the department, after hearing, may assess a civil penalty upon a person or municipality for such violation. Such a penalty may be assessed whether or not the violation was wilful. The civil penalty so assessed shall not exceed ten thousand dollars ($10,000) per day for each violation. In determining the amount of the civil penalty the department shall consider the wilfullness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors. . . ."

DER has the burden of proving by a preponderance of the evidence that Lawrence committed violations of the CSL and that civil penalties should be assessed: 25 Pa. Code §21.101(b)(1).

Count I—AMD

In Count I of its Complaint, DER alleged that Lawrence discharged AMD from the MP5 portion of the Rogers Mill Strip into Buck Run and its tributaries. The discharges were alleged to have been continuous, specifically including the following dates: January 23, February 28, May 13, May 21, May 27, June 2, June 10, July 1, July 2, July 7, July 22, July 23, August 14, October 10, October 23, November 17, all in 1980, and January 7, and January 28 in 1981. In its post-hearing brief, DER abandoned entirely the period following October 10, 1980, and eliminated the claim of continuous discharges for the period subsequent to May 27, 1980.

There is no dispute about the fact that discharges at culverts 2 through 5 constituted AMD. There is serious dispute, however, about the source of those discharges.

DER points, *inter alia*, to the following evidence linking those discharges to Lawrence's surface mining operation on the MP5 area of the Rogers Mill Strip:

1. the discharges emanated from MP5;

2. the discharges at culverts 2, 3, and 4 were traced to the toe of spoil on MP5;

3. construction of the toe of spoil ditch on MP5 reduced the flows at culverts 2, 3 and 4;

4. Lawrence mined MP5 above culverts 2 through 5;

5. the discharges at culverts 7 through 10 are not AMD;

6. the water discharged at culverts 2 through 5 is chemically similar to the water on MP5;

7. there is no other logical source of AMD than the surface mining operations of Lawrence on MP5 and Marsalino on the Chanin Strip.

Lawrence disputed much of this evidence. Its witnesses maintained that the discharges could not have been traced to the toe of spoil on MP5; that the water discharged at the culverts is chemically different in certain respects from the water on MP5; that there is no geologic mechanism on MP5 that would enable water to penetrate below the crop line of the main seam; and that the water discharged from MP5 constituted AMD before any surface mining had been done.

Much time could be devoted to weighing the evidence on each of these disputed points, resolving the many conflicts and attempting to reach sensible conclusions. That is unnecessary, in my judgment, because Lawrence's evidence failed to address several decisive points in DER's case.

The first of these pertains to the flow of water at culverts 2, 3 and 4. DER's undisputed evidence is that such flows diminished substantially but not completely after the toe of spoil ditch was constructed. This fact is strong evidence that some hydrologic connection existed between the MP5 area and culverts 2, 3, and 4. While Lawrence's experts went to great lengths to disprove any connection, they offered no explanation at all for the reduction in flows.

Lawrence's experts also were hardpressed to explain why discharges at culverts 2, 3, 4 and 5 constituted AMD while discharges at culverts 7, 8, 9, and 10 did not. The latter culverts all were along and down gradient from Marsalino's Chanin Strip; and yet the discharges showed no evidence of AMD. Beginning with culvert 5, however (just 300 feet or so away), and continuing downgrade to culvert 2, the discharges are AMD. This evidence clearly points primarily to Lawrence, and not to Marsalino, as the generator of the condition.

Lawrence's witnesses attempted to establish that the discharges at culverts 2 through 5 cannot originate on MP5 because they emanate from below the crop line of the main seam which Lawrence mined. The pavement below the main seam, these witnesses contend, is impermeable, preventing any vertical percolation of AMD from Lawrence's operation. The only other currently possible source of these discharges would be Marsalino; but that operator mined the same coal seam as Lawrence and as close as one hundred feet upgrade from Lawrence's south endwall. If AMD could not percolate below that coal seam on Lawrence's site, it is unlikely that it could have done so on Marsalino's. Lawrence's final rationale maintains that discharges from MP5 were AMD prior to any mining activity at all. Aside from the fact that this is possible, the only evidence to support the argument is a comment supposedly made by a former DER inspector in 1975 and overheard by the man who now is Lawrence's foreman. After securing a sample of water from the ditch along Pirl Spring Road, the inspector reportedly said that he had not found any good water in the vicinity.

At best, this evidence provides feeble support for Lawrence's position. It loses even this significance when measured against other evidence. It is undisputed that Buck Run was classified as a high quality cold water fishery and was stocked with trout by the Pennsylvania Fish Commission before any surface mining began on nearby land. After the 1978 season, Buck Run was taken off the stocking list because the portion of it below the confluence with the unnamed tributary had degraded to the point where macro invertebrates were completely absent. While this action was taken as a result of Marsalino's operation on the Chanin Strip (which was cited for AMD discharges in 1979), the evidence

substantiates the fact that Buck Run was not degraded prior to 1979. This means that there could not have been any appreciable volume of AMD entering the stream from the Rogers Mill Strip, the Chanin Strip or any other source.

If the water in the ditch along the Pirl Spring Road had any negative characteristics when tested by the DER inspector in 1975, the nature of the contaminant and the volume of the discharge obviously were not enough to impact Buck Run. This fact is reinforced by the testimony of Terry Confer, a DER inspector, who walked the Pirl Spring Road with Lawrence's foreman on July 24, 1979, and could find no discharges at all from the Rogers Mill Strip. Six months later, when the flows at culverts 2 through 5 amounted to thousands of gallons per day, the impact of Buck Run was devastating. Clearly, these discharges were caused by Lawrence's surface mining operation and exceeded in volume and, perhaps, in potency any AMD that previously might have originated from the Rogers Mill Strip.

DER had not shown the precise mechanism by which AMD migrated below the crop line of the main seam on the Rogers Mill Strip, has not explained the disparity in iron concentrations revealed by the water samples, and has not shown a precise breakdown of the volumes of AMD contributed by Lawrence's operation and by Marsalino's operation.[1] Nonetheless, the evidence connecting Lawrence's operation to the discharges of AMD at culverts 2 through 5 is overwhelming. Lawrence, in fact, has admitted to part of it.

---

[1] DER's pollution loading calculation, which attempts to estimate the pounds per day of pollutants discharging at the culverts along Pirl Spring Road, assigns about 50% of the total pollution load to Lawrence. See CX 29, CX 30 and CX 31.

The burden of proof in a case like this does not require that every stone be turned, that every detail be completely explained. Evidence can be compelling and overpowering even though it is circumstantial. *Dillsburg Septic Service v. DER*, 1976 EHB 184; *DER v. Bucks County Water and Sewer Authority and The Korman Corp.*, 1975 EHB 414. The circumstantial evidence of a hydrologic connection in this case, unlike that in *Hepburnia Coal Company v. DER*, 1986 EHB 563, rises to that level and implicates Lawrence. The fact that Marsalino also may be at fault does not exonerate Lawrence. Lawrence is responsible for all discharges caused by its surface mining operation, even though some of the AMD may originate off the Rogers Mill Strip. *Commonwealth v. Barnes & Tucker Company*, 472 Pa. 115, 371 A.2d 461 (1977); *Commonwealth v. Harmar Coal Company*, 452 Pa. 77, 306 A.2d 308 (1973).

DER has carried its burden of proving that the discharges from culverts 2, 3, and 4 violated the effluent limitations contained in DER's regulations and in Lawrence's MDP on a number of dates in 1980. DER maintains that the discharges were continuous from January 23, 1980, to May 27, 1980.[2] The evidence shows that during this period, laboratory samples and/or field P_h tests were run on each of these culverts on January 23, 1980, February 28, 1980, March 12, 1980, March 20-21, 1980, May 13, 1980, and May 21, 1980. In every instance, the discharges violated the effluent limitations in one or more respects. Treatment was being provided by Lawrence only on one of those dates, May 13, but the metals were not being affected.

---

[2] The evidence could support a conclusion that the discharges were continuous to a date beyond May 27, 1980; but, since DER has not made such a claim, the Board will not impose it.

The flows at culverts 2, 3, and 4 did not diminish significantly until construction of the toe of spoil ditch began on May 27, 1980. It is reasonable to conclude that, up to that point, the discharges were flowing continuously into the culverts. It is also reasonable to conclude that, since this water was not diverted to sedimentation ponds until after May 27, 1980, the metals were never treated in any manner prior to that time. Since the concentrations of metals consistently exceeded effluent limitations when they were measured prior to May 27, it is reasonable to conclude that they did so on every day.

DER claims that, for the period following May 27, 1980, the discharges at culverts 2, 3 and 4 exceeded effluent limitations only on the actual dates when DER inspected the Rogers Mill Strip. However, there were some inspections when no laboratory or field tests were done. When these are excluded, the pertinent dates for culverts 2 and 4 are the following dates in 1980: June 10, July 1-2, July 7, July 22-23, August 14 and October 3. For culvert 3 they are June 10, July 1-2, July 22-23, August 14 and October 3. The evidence establishes that, on these dates, the discharges violated the effluent limitations in one or more respects.

In summation, Lawrence's discharges from the Rogers Mill Strip into Buck Run or the unnamed tributary violated effluent limitations for 125 days between January 23, 1980, and May 27, 1980, and for a maximum of 6 days between May 28, 1980, and October 10, 1980.

DER acknowledges that it vacillated on culvert 5, charging Lawrence with the duty to treat that discharge only for a period June 11, 1980, to June 30, 1980, and for a period September 10, 1980 to October 10, 1980. While

DER claims that the discharges were continuous during these two periods, aggregating 52 days, water samples were taken only on October 3, 1980. There is no question that the discharge on that date exceeded effluent limitations, but to extrapolate that one instance into 52 days would be highly inappropriate. Moreover, Lawrence already has been charged with unlawful discharges on October 3, 1980, at culverts 2, 3 and 4. The fact that the culvert 5 discharge also was unlawful on that date does not add another day to the total.

In its Complaint, DER charged Lawrence with discharging AMD into the waters of the Commonwealth from the Spruell Strip "at all times material to the Complaint, including September 4, 1980. . . ." In its Motion to Amend Complaint to Conform to Proof, DER requests that the allegation with respect to AMD at the Spruell Strip be limited to September 4, 1980. Since the evidence in the record concerns only that one date, DER's Motion is granted.

DER's evidence firmly establishes the fact that Lawrence allowed AMD to discharge from the Spruell Strip on September 4, 1980. Lawrence presented no evidence to the contrary. Accordingly, I conclude that Lawrence violated its effluent limitations on discharges from the Spruell Strip on one day.

In its Complaint, DER alleges that the discharges of AMD constitute violations of Sections 3, 301, 307, 315 and 401 of the CSL, Sections 77.92(c), 99.33(a), (b) and (c) of DER's regulations in 25 Pa. Code, and Standard Conditions 10, 11 and 12 of Lawrence's mine drainage permits. All statutory and regulatory citations, of course, relate to those in effect during the period January 23, 1980, to October 10, 1980.

Section 3 of the CSL, 35 P.S. §691.3, declares the discharge of industrial waste into the waters of the Commonwealth, causing or threatening pollution, to be a public nuisance. Mine drainage is specifically included in the definition of "industrial waste" in Section 1 of the CSL, 35 P.S. §691.1. Section 301, 35 P.S. §691.301, prohibits the discharge of industrial waste, except as provided later in the statute. Section 307, 35 P.S. §691.307, prohibits the discharge of industrial waste unless it is pursuant to a permit from DER or in accordance with DER regulations. Section 315, 35 P.S. §691.315, prohibits any discharge from a mine unless it is pursuant to a permit from DER and in accordance with DER regulations. Section 401, 35 P.S. §691.401, declares it to be unlawful to pollute the waters of the Commonwealth by the discharge of any substance of any kind.

25 Pa. Code §77.92(c) sets forth water quality criteria for permittees under the CSL. Petinent to this discussion are requirements that discharges of mine drainage have a Ph between 6 and 9 and no concentrations of iron exeeding 7 milligrams per liter. 25 Pa. Code §99.33(a), (b) and (c), which also relate to mine drainage, impose the additional requirement that the discharge not be acid. These same effluent limitations are incorporated into Lawrence's mine drainage permits as Standard Conditions 10, 11 and 12.

Certainly Lawrence's discharges violated all of these provisions.

Count II—Erosion and Sedimentation Controls

In Count II of the Complaint, DER alleged that Lawrence failed to implement and maintain effective erosion and sedimentation (E&S) control measures on the

MP5 portion of the Rogers Mill Strip, resulting in the conveyance of sediment into Buck Run and its tributaries. The discharges were alleged to have been continuous, specifically including the following dates: February 28, May 13, May 21, May 27, June 2, June 10, July 1, July 2, July 7, July 22, July 23, August 14, October 3, all in 1980, and January 26, 1981.

In the Application for leave to Amend Complaint filed by DER on July 6, 1982, DER sought to revise the allegations in Count II to include discharges emanating from MP5A. The Application was denied by former Board Chairman Harnish, as stated in the procedural history portion of this Adjudication, but testimony relating to the inadequacy of E&S controls on MP5A was admitted into the record. DER again sought to include the MP5A violations in the Complaint in its Motion to Amend Complaint to Conform to Proof filed after the hearings were concluded.

The precise scope of Harnish's ruling is not clear, from the record. Nonetheless, the ruling denied DER's Application to Amend and, on its face, appeared to exclude E&S violations on MP5A from the case. Even though some testimony on these violations was introduced and even though Lawrence has made no claim of being prejudiced by DER's post-hearing Motion to include them, I am not convinced that the subject was fully litigated. Accordingly, I deny DER's Motion to Amend with respect to alleged E&S violations on MP5A and refuse to consider them in assessing civil penalties against Lawrence.

The evidence discloses that Lawrence's MDP required the construction of a toe of spoil ditch prior to commencement of any mining operations. The primary purpose of this ditch was E&S control. Lawrence

commenced mining without having constructed the ditch, relying instead on the grading of roads to keep surface runoff on the site. No DER inspector had complained about the absence of the toe of spoil ditch until February 28, 1980, when Mark Frederick ordered that it be dug. It is clear that Mr. Frederick's chief concern at that time was not E&S but AMD. He directed that the ditch be dug long enough and deep enough to intercept the discharges flowing to culverts 2, 3 and 4.

E&S problems on MP5 became a concern on March 20, 1980, when a heavy discharge of muddy water was observed flowing from the Haul Road into Buck Run. Subsequently, on May 12-13, May 21, June 10, July 1-2 and July 22-23, in 1980, observations and water samplings revealed that discharges from MP5 into Buck Run and the unnamed tributary exceeded the effluent limitation for total suspended solids.

Lawrence began constructing the toe of spoil ditch on May 27, 1980. By July 1, 1980, the ditch and the two sedimentation ponds to which it connected were completely installed. These facilities provided effective E&S controls for much of the discharge emanating from culverts 2, 3 and 4. In addition, since the flows at those culverts significantly lessened after the ditch was dug and deepened, the amount of silt washing off the site was also reduced. In fact, on July 7, 1980, the flows at culverts 3 and 4 were so low that laboratory samples were not taken; and the total suspended solids measured at the culvert 2 discharge were within effluent limitations.

The failure to have effective E&S controls on MP5 was continuous from March 30, 1980, when the toe of spoil ditch was supposed to have been in place pursuant to Mr. Frederick's order, to July 1, 1980, when the E&S facilities were completely installed. March 20, 1980, must be considered

an isolated violation since it occurred prior to the compliance date mandated by Frederick. Likewise, July 22-23, 1980, must be treated apart from the continuous violations, since there was a period earlier in July when E&S controls were working effectively. The violations cover a total of 95 days.

In its Complaint, DER also charged Lawrence with E&S violations at the Spruell Strip "on dates including but not limited to September 4, 1980." In its Motion to Amend Complaint to Conform to Proof, DER seeks to revise its allegation with respect to the Spruell Strip so as to limit it to September 4, 1980. Since the only evidence presented concerned this date alone, the amendment will be allowed.

DER proved that on September 4, 1980, Lawrence had not constructed a toe of spoil ditch on the Spruell Strip, as required by its mine drainage permit, and there was evidence of sediment runoff into a tributary of Morgan Run. Lawrence made no attempt to dispute these facts. Accordingly, I conclude that Lawrence violated the E&S requirements of its permit pertaining to the Spruell Strip on one day.

DER's Complaint alleges that Lawrence's failure to implement and maintain effective E&S controls resulted in the conveyance of sediment into the waters of the Commonwealth, including Buck Run, which contamination has destroyed Buck Run's capacity to support benthic macro invertebrate and other aquatic communities. In its Motion to Amend Complaint to Conform to Proof, DER proposes to revise this allegation so as to limit it to the MP5 and MP5A portions of the Rogers Mill Strip.

As already noted, the inclusion of MP5A at this late point in the proceedings is not appropriate. However, the only evidence of stream pollution presented by DER relates to Buck Run and the unnamed tributary. No evidence concerning the tributary to Morgan Run appears in the record. Consequently, DER's Motion to Amend will be granted to the extent that it limits the allegation of stream pollution to E&S violations on MP5.

These violations, according to the Complaint, are contrary to the provisions of Sections 3, 301, 307, 315 and 401 of the CSL, the provisions of 25 Pa. Code §102.4(a) and Standard Condition No. 3 of Lawrence's mine drainage permits. It should be noted, at this point, that "industrial waste" as defined in Section 1 of the CSL, 35 P.S. §691.1, includes "silt, coal mine solids, rock, debris, dirt and clay from coal mines. . . ." Thus, the provisions of Sections 3, 301 and 307 of the CSL, as applied previously with respect to AMD, is equally applicable to the discharges caused by the E&S violations.

Section 315 of the CSL, 35 P.S. §691.315, which prohibits mining operations or discharges except in accordance with a permit and DER regulations, also applies. 25 Pa. Code §102.4(a) requires the implementation of E&S controls to minimize accelerated erosion and sedimentation. Standard Condition No. 3 of Lawrence's mine drainage permits mandates that no silt, coal mine solids, rock, debris, dirt and clay be washed, conveyed or otherwise deposited into the waters of the Commonwealth. Lawrence clearly has violated these provisions.

Section 401 of the CSW, 35 P.S. §691.401, the "catch-all" provision that prohibits pollution by any substance of any kind, also has been violated by Lawrence's failure to provide effective E&S controls.

Count III—Improper Disposal of Toxic Material

In Count III of the Complaint, DER alleges that Lawrence failed to properly dispose of acid-bearing material "at the site covered by Mining Permit No. 1063-5 and amendments on dates including but not limited to May 12, 1980;" and has caused degradation of the waters of the Commonwealth.

DER's evidence involved only MP5; so it is unnecessary to discuss any allegations concerning MP5A. The evidence presented shows that Mark Frederick observed on May 13, 1980, that Lawrence was disposing of acid and toxic bearing materials on the floor of the pit against the spoils. Lawrence's foreman told him that the previous DER inspector had approved that method of handling reject material. Mr. Frederick examined Lawrence's MDP and concluded that Lawrence's method violated Standard Condition No. 29. He ordered Lawrence to change its method of handling this type of material. Mr. Frederick observed that Lawrence had not changed its handling method on June 10, 1980, or on July 1-2, 1980.

As noted above, DER charged in the Complaint that these alleged violations occurred on dates including but not limited to May 12, 1980, but no evidence was presented concerning that date. In its post-hearing brief, DER states that the alleged violations occurred on May 13, June 6, June 16, and July 1, all in 1980, and were not continuous. But there is no testimony whatever concerning June 6 and June 16. The only dates for which there is any testimony on this subject are May 12, June 10 and July 1-2.

DER claims that Lawrence's handling method violated Standard Condition No. 29 of the MDP. However, the precise language of this Standard Condition is not part

of the record. Mr. Frederick testified that Lawrence's handling method "was indeed contrary to the permit" (N.T. 125), and Lawrence made no attempt to show that it was not. Consequently, I conclude that Standard Condition No. 29 of the MDP was violated by Lawrence's method of handling reject material.

DER concedes that these violations did not directly cause any injury to waters of the Commonwealth, but argues that they may have contributed to the AMD discharges from MP5. In the Complaint, DER alleged violations of Sections 315 and 402 of the CSL, in addition to Standard Condition No. 29 of the MDP. Section 315, 35 P.S. §691.315 prohibits the operation of a mine except in accordance with a DER permit and DER regulations. Section 402, 35 P.S. §691.402, provides for regulatory control over activities creating a danger of water pollution. Since DER has not cited any regulation governing the handling of reject materials in a mining operation, Section 402 is not in issue.

The record does establish, however, that Lawrence violated the MDP and Section 315 of the CSL on a total of three days.

Count IV—Disturbing Land Designated as a Barrier

In this Count, DER alleged that on September 5, 1980, Lawrence disturbed land within 75 feet of a stream on the Kennedy Strip by pushing spoils and rock onto the area. This is alleged to be a violation of Standard Condition No. 35 of Lawrence's Mine drainage permit and of Section 315 of the CSL, 35 P.S. §691.315.

The only evidence presented by DER on this subject involved September 15 and not September 5, as alleged in the Complaint. DER made no request to amend this Count in its Post-hearing Motion to Amend Complaint to

Conform to Proof. As a result, the allegations of the Complaint remain in effect and have not been proved. This Count, accordingly, will be disregarded.

Assessment of Civil Penalty

Section 605 of the CSL, 35 P.S. §691.605 (quoted at the outset of this Discussion), requires the Board to consider the following factors in determining the amount of a civil penalty:

1. wilfullness of the violation;
2. damage or injury to the waters of the Commonwealth or their uses;
3. cost of restoration; and
4. other relevant factors.

The Board has interpreted the last factor to include deterrence. *DER v. Jefferson Township*, 1978 EHB 134. No evidence has been presented on the cost of restoration; so that factor will be excluded.

The Board has discussed wilfullness in a number of prior opinions, especially in *DER v. Rushton Mining Co.*, 1976 EHB 117. In that case the Board observed that there is a degree of wilfullness evident from the knowledge that certain consequences are likely to result from a particular action or failure to act. Lawrence's AMD discharges from MP5 certainly involved this level of wilfullness from January 23, 1980, when first informed of them, until July 1, 1980, when the toe of spoil ditch had been dug deep enough and long enough to intercept most of the flow going to culverts 2, 3 and 4. Only four instances of unlawful discharges occurred subsequent to July 1, 1980. These involved flows that continued to emanate from MP5 despite the efforts previously devoted to intercepting them. While Lawrence's

responsibility was no different with respect to these flows than it was with respect to those previously discharged, the wilfullness does not seem to rise to the same level.

The circumstances surrounding the AMD discharge at the Spruell Strip were not developed on the record to any great extent. Therefore, it is not possible to assign a level of wilfullness to this discharge.

Lawrence's failure to construct the toe of spoil ditch to provide E&S controls on MP5, which was required by its permit, until months after being ordered to do so by DER rises to a high level of wilfullness and constitutes nearly intentional conduct. Lawrence's failure is more egregious with respect to E&S violations than with respect to AMD violations because the primary purpose of the ditch was E&S control. While Lawrence's resistance to digging the ditch deep enough and long enough to intercept groundwater flowing to the culverts is perhaps understandable (but not excusable), there is absolutely no reason why it did not immediately construct the ditch in order to stop surface runoff. This wilfullness on Lawrence's part must be deemed to have affected all of the E&S violations on MP5 except for the one on March 20, 1980, before the ditch was required to be installed, and the one on July 22-23, after the toe of spoil ditch and sedimentation ponds had been completely installed.

As with the AMD discharge, the circumstances surrounding the E&S violation at the Spruell Strip are not sufficiently developed in the record to enable a determination to be made as to whether it was wilfull.

Lawrence is charged with improperly handling reject materials on three days. Apparently, Lawrence was not aware that its method was improper until the violation

was observed on the first day. That violation cannot be viewed as wilfull; but the other two subsequent violations are inexcusable.

DER presented an overwhelming array of evidence to show the injury done to Buck Run and the unnamed tributary by Lawrence's discharges of AMD, metals and suspended solids. While Lawrence's witnesses attempted to soften the force of this evidence, it remained basically untouched. The combined effects of AMD, metals and suspended solids rendered Buck Run unsuitable as a fishery. It is true that Marsalino's discharges had created the first significant impact on Buck Run and had prompted the Pennsylvania Fish Commission to remove it from the stocking list. Nonetheless, Lawrence's discharges added to the problem and, most assuredly, prolonged the recovery period for the stream. DER's witness estimated in 1982, two years after the date when Lawrence finally began to take some steps to control the discharges, that it would take another three to five years for Buck Run to recover to its pre-mining condition. On the other hand, Lawrence's witness maintained that neither Buck Run nor the unnamed tributary showed any signs of degradation in 1982. This opinion is of questionable value since this witness did not believe that the two streams had ever been seriously degraded in the first place.

The preponderance of the evidence clearly proves that Buck Run and the unnamed tributary were seriously and adversely affected by Lawrence's discharges and that the use of Buck Run as a fishery was interrupted for a period of years.

In its post-hearing brief, DER submits that Lawrence's degrading of Buck Run and the unnamed tributary is a violation of Section 401 of the CSL, 35 P.S.

§691.401, separate and distinct from the violations of other sections of the CSL and DER's regulations. Lawrence argues that the violations merge. DER's position is legally correct, although its impact on the final outcome of this case is not significant. Violations of regulations and permit conditions can occur even if they do not result in the degradation of waters of the Commonwealth. Section 401 of the CSL, already referred to in this Adjudication as a "catch-all" provision, was intended to prohibit water pollution by whatever means, whether the activity is lawful or not. Accordingly, there can be a violation of Section 401 even if no other sections of the CSL are involved.

DER presented no evidence to show what, if any, impact the discharges of AMD and suspended solids from the Spruell Strip had on the waters of the Commonwealth. Likewise, it presented no evidence to establish that the improper handling of reject materials on MP5 polluted the waters of the Commonwealth. Accordingly, that factor will not be considered in determining civil penalties for these violations.

Fashioning a civil penalty containing an element of deterrence is appropriate in this case because of the dramatic effect discharges of AMD, metals and suspended solids have on streams like Buck Run that are uniquely suited for the propagation of native brook trout and the accommodation of introduced species. The delicate ecosystem of such streams is easily devastated; and restored, if at all, only by the slow, painstaking work of Mother Nature.

The problem posed by the present case is the total absence of evidence on which to base a meaningful decision that will serve as a deterrent to Lawrence and to others. There is no evidence of Lawrence's net worth;

no evidence of the amount of money Lawrence saved by not implementing control measures earlier than it did; no evidence of the cost of injury to Buck Run or the cost of restoring it; no evidence of any kind to suggest an amount of civil penalty that would deter Lawrence from similar actions in the future. Absent such evidence, we are left only with a very generalized approach to deterrence whereby something more than a "nominal" amount is assessed. Since the nature and extent of Lawrence's violations already demand something more than a nominal penalty, deterrence cannot be much of a factor in determining the final amount.

The discharges of AMD from the Rogers Mill Strip warrant a civil penalty of $500 for each of the days of continuous violations from January 23, 1980, to May 27, 1980, and for June 10, 1980, and July 1-2, 1980, when the toe of spoil ditch was completed. The discharges of AMD subsequent to that date, not rising to the same level of wilfullness, warrant a civil penalty of $450 each. Since the record is not as complete with respect to the discharge of AMD at the Spruell Strip, a civil penalty of $350 will be assessed for that one day's violation.

The violations of E&S controls at the Rogers Mill Strip were not as serious in nature as the discharges of AMD. However, the wilfullness of the continuing violations from March 30, 1980, to July 1, 1980, rises to a higher level than that for AMD. Accordingly, a civil penalty of $400 is appropriate for those 93 days while a civil penalty of $250 is appropriate for the two remaining days. Circumstances surrounding the E&S violation at the Spruell Strip, being equally as uncertain as the AMD discharges at that Strip, a civil penalty of $200 is all that seems appropriate.

Lawrence's improper handling of toxic material cannot be considered serious violations since DER did not show any impact on waters of the Commonwealth. Accordingly, a civil penalty of $100 is all that should properly be imposed for the first day's violation. Since the other two days involve a higher element of wilfullness, however, a civil penalty of $200 will be imposed for each of those days.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this appeal.

2. DER has the burden of proving by a preponderance of the evidence that Lawrence violated the CSL and that civil penalties should be assessed.

3. The AMD discharges at culverts 2, 3 and 4 emanated from Lawrence's MP5 area, were affected by Lawrence's surface mining operations on the MP5 area, and constituted violations of Sections 3, 301, 307, 315 and 401 of the CSL, 35 P.S. §§691.1 et seq., Sections 77.92(c), 99.33(a), (b) and (c) of DER's regulations in 25 Pa. Code, and Standard Conditions 10, 11 and 12 of Lawrence's MDP.

4. The unlawful discharges of AMD at culverts 2, 3 and 4 were continuous for 125 days from January 23, 1980, to May 27, 1980, and intermittent on six days between May 28, 1980, and October 10, 1980.

5. The AMD discharges at culvert 5 emanated from Lawrence's MP5 area, were affected by Lawrence's surface mining operations on MP5, and constituted violations of Sections 3, 301, 307, 315 and 401 of the CSL, 35 P.S. §§691.1 et seq., Sections 77.92(c), 99.33(a), (b) and (c) of DER's regulations in 25 Pa. Code, and Standard Conditions 10, 11 and 12 of Lawrence's MDP.

6. The unlawful discharges of AMD at culvert 5, during the periods when DER held Lawrence solely or jointly responsible for them, occurred only on one date and that date coincided with unlawful discharges of AMD at one or more of the other culverts.

7. On September 4, 1980, a discharge of AMD emanated from Lawrence's Spruell Strip, was affected by Lawrence's surface mining operations on the Spruell Strip, and constituted violations of Sections 3, 301, 307, 315 and 401 of the CSL, 35 P.S. §§691.1 et seq., Section 77.92(c), 99.33(a), (b) and (c) of DER's regulations in 25 Pa. Code, and Standard Conditions 10, 11 and 12 of the mine drainage permit for the Spruell Strip.

8. Lawrence's failure to implement and maintain adequate E&S controls on the MP5 area resulted in discharges of sediment from the MP5 area that violated Sections 3, 301, 307, 315 and 401 of the CSL, 35 P.S. §§691.1 et seq., Section 102.4(a) of DER's regulations at 25 Pa. Code, and Standard Condition No. 3 of Lawrence's MDP.

9. The unlawful discharges of sediment from MP5 were continuous for 93 days from March 30, 1980, to July 1, 1980, and intermittent on March 20, 1980, and July 22-23, 1980.

10. On September 4, 1980, as a result of Lawrence's failure to implement and maintain adequate E&S controls on the Spruell Strip, sediment was discharged from the Spruell Strip in violation of Sections 3, 301, 307, 315 and 401 of the CSL, 25 P.S. §§691.1 et seq., Section 102.4(a) of DER's regulations at 25 Pa. Code, and Standard Condition No. 3 of the mine drainage permit for the Spruell Strip.

11. On 3 separate dates, Lawrence improperly handled reject material on the pit floor of the MP5 area in violation of Section 315 of the CSL, 35 P.S. §691.315, and Standard Condition No. 29 of Lawrence's MDP.

12. Lawrence's unlawful discharges of AMD and sediment from the MP5 area degraded Buck Run and the unnamed tributary and adversely affected the use of Buck Run as a cold water high quality fishery.

13. Lawrence's unlawful discharges of AMD from the MP5 area were wilfull from January 23, 1980, until July 1, 1980, but were less wilfull after that date.

14. Lawrence's unlawful discharges of sediment from the MP5 area were wilfull nearly to the point of being intentional on all relevant dates except March 20, 1980, and July 22-23, 1980.

15. Lawrence's unlawful handling of reject material on the pit floor of the MP5 area was wilfull on the last two of the three dates involved.

16. DER did not present sufficient evidence to show any degree of wilfullness connected with Lawrence's unlawful discharges of AMD and sediment from the Spruell Strip.

17. DER did not present sufficient evidence to enable the Board to consider deterrence and the cost of restoration in setting a civil penalty.

18. DER did not present evidence to sustain the allegations in the Complaint relating to the Kennedy Strip.

19. The assessment of civil penalties is appropriate in this case in the following amounts:

Rogers Mill Strip					
AMD	127 x $500	= $	63,500		
	4 x $450	=	1,800		
				$ 65,300	
E&S	93 x $400	= $	37,200		
	2 x $250	=	500		
				37,700	
Rejects	1 x $100	= $	100		
	2 x $200	=	400		
				500	
Total					$ 103,500
Spruell Strip					
AMD	1 x $350	=		$ 350	
E&S	1 x $200	=		200	
Total					550
GRAND TOTAL					$ 104,050

ORDER

AND NOW, this 5th day of July, 1988, civil penalties are assessed against Lawrence Coal Company in the aggregate amount of $104,050 for violations of the CSL, the regulations of DER, and the provisions of its mine drainage permits.

The entire civil penalty is due and payable immediately into the Clean Water Fund. The Prothonotary of Fayette County is ordered to enter the full amount of the civil penalty as a lien against any property of Lawrence Coal Company, together with interest at the rate of 6% per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Robert D. Myers, MEMBER

DATED: July 5, 1988

cc: Bureau of Litigation
Harrisburg, PA
For the Commonwealth, DER:
Diana J. Stares, Esq.
Western Region
For Appellant:
William M. Radcliffe, Esq.
Uniontown, PA

In accordance with the order of Commonwealth Court, neither Chairman Maxine Woelfling nor Member William A. Roth participated in the decision of this case.

APPENDIX "D"

Opinion and Order of the Commonwealth Court of Pennsylvania (unreported) Dated January 25, 1988.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 3062 C.D. 1986

LAWRENCE COAL COMPANY,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
RESOURCES,

Respondent.

BEFORE: HONORABLE JOHN A. MacPHAIL,
Judge
HONORABLE MADALINE PALLADINO,
Judge
HONORABLE JACOB KALISH,
Senior Judge

ARGUED: November 20, 1987

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PALLADINO FILED: January 25, 1988

Lawrence Coal Company (Lawrence) appeals from an order of the Environmental Hearing Board (Board) which, after reconsideration, affirmed its prior adjudication assessing $150,700 in civil penalties against Lawrence for violations of the Clean Streams Law (Law).[1] For the reasons set forth below, we vacate and remand.

On February 25, 1981, the Department of Environmental Resources (DER) filed a complaint against Lawrence for civil penalties pursuant to Section 605 of the Law for violations alleged to have occurred in 1980. The Board, with Chairman Dennis J. Harnish presiding, held eleven days of evidentiary hearings between June 2, 1982 and November 23, 1982. In May of 1983, before the Board had rendered an adjudication on the matter, Chairman Harnish resigned.

The matter was assigned to the two remaining Board members, Anthony Mazullo and Edward Gerjuoy. However, because both Mazullo and Gerjuoy were unable to attend to the matter because of substantial caseloads of their own, the case was reassigned to newly appointed Hearing Examiner Edward R. Casey.

On October 20, 1983, Casey, without consulting either of the other Board members, wrote a letter to counsel for both the DER and Lawrence explaining his view of the matter based upon his reading of the record. After recounting portions of the testimony of expert witnesses for both Lawrence and the DER, Casey concluded that

> "[t]his is simply not the kind of case where a regulatory agency should seek continuing civil penalties against a defendant; because... the testimony of DER witnesses on the issue of

[1] Act of June 22, 1937, P. L. 1987, *as amended*, 35 P.S. §§691.1-691.1001.

> Lawrence's direct responsibility for acid mine drainage. . . was equivocal at best and it just does not satisfy DER's burden of proof to establish this pivotal fact by a fair preponderance of the evidence."

Casey recommended that the two parties reach settlement on the matter and suggested that a "nominal" fine of $100 per month up to $1000 total might be appropriate.

Thereafter, according to sworn affidavit of counsel for DER, the following occurred:

> On October 24, 1985, Mr. Harnish, who was no longer employed by the Board, was in the offices of the Western Region Bureau of Litigation for the purpose of meeting with another attorney on a personal matter, and [counsel for DER] showed Mr. Harnish the letter written by Mr. Casey. . . . After reviewing the letter, Mr. Harnish informed [DER counsel] that, prior to resigning from the Board, Mr. Harnish had discussed this case with Mr. Casey and had advised him that after hearing the evidence presented by both parties he had initially concluded that the Department had met its burden of establishing that Lawrence was responsible for the unauthorized discharges of mine drainage.

After hearing Harnish's comments on the Casey letter, counsel for DER wrote a letter to Casey alleging bias against DER and filed a petition with the Board for Casey's recusal.

On November 22, 1983, in response to DER's petition, the remaining members of the Board (Mazullo and Gerjuoy) granted DER's motion for recusal and reassigned the matter to Mazullo for purposes of drafting a proposed adjudication on the merits of the contest. Lawrence, who had opposed the DER's petition for recusal, thereafter filed a petition requesting the Board either to dismiss the complaint against Lawrence,

or in the alternative, to recuse Mazullo, since he was a member of the original Board on which Harnish had sat, and reassign the matter to a neutral hearing examiner. The Board denied this petition in an order and opinion dated December 14, 1983. By way of explanation for the recusal of Casey and reassignment to Mazullo, the Board stated that "an indicia of conflict could be perceived from the disclosures made by Harnish to DER counsel, and the Board thought it in the best interest of all concerned that the members of the Board not involved in the unfortunate incident reserve unto themsleves the final determination of the controversy." The case was scheduled for proposed adjudication by Mazullo.

Mazullo subsequently prepared a propose adjudication on the merits of the controversy. During this time, Maxine Woefling was appointed to the chair of the Board. Before her appointment, Woefling was Chief Regulatory Counsel for the DER and had also been an attorney with DER during pendency of the hearings conducted in 1982.

On January 31, 1986, before the Board had taken any action on the proposed adjudication, Mazullo resigned his position. Four months later, on May 27, 1986, the Board issued an adjudication signed by Woefling and Gerjuoy which purported to adopt, with modifications, the draft of Mazullo. The order assessed $150,700 in civil penalties for multiple violations of the Clean Streams Law and the regulations adopted pursuant thereto.

Lawrence subsequently filed two petitions for reconsideration requesting (1) the recusal of Woefling; (2) the recusal of Gerjuoy; or, in the alternative, (3) dismissal of the complaint against Lawrence. On September 12, 1986, the Board, consisting of Gerjuoy and William A. Roth, a newly appointed Board member,

issued an order denying Lawrence's motion for recusal of Gerjuoy. On September 19, 1986, the Board, still composed of Gerjuoy and Roth, dismissed Lawrence's petition for reconsideration and affirmed its prior May 27, 1986 adjudication assessing $150,700 in civil penalties against Lawrence. The Board concluded that since Woefling had in no way participated in the Board's reconsideration and affirmance of its May 27, 1986 adjudication, the issue of her participation in the matter was moot. Following this final order, Lawrence appealed to this court.

Lawrence contends that it was denied its due process right to a fair and impartial adjudication on the subject matter of the dispute because improprieties occurred. Lawrence also challenges the legality of the Board's assessment of $150,700 in civil penalties.

It is fundamental that the resolution of any controversy be rendered in an impartial manner by irreproachably impartial officials. To this end, "any tribunal permitted by law to try cases and controversies must not only be unbiased *but must avoid even the appearance of bias.*" *Horn v. Township of Hilltown*, 461 Pa. 745, 337 A.2d 858, 859-60 (1975) (quoting *Gardner v. Repasky*, 434 Pa. 126, 129, 252 A.2d 704, 706 (1969)). This foundational maximum applies equally in the context of administrative tribunals as it does in courts of law. As President Judge Crumlish, speaking for this court, has stated:

> The crucial function in the prosecution and adjudication of administrative proceedings is in the resolution of disputed facts because the findings of fact emanating from administrative proceedings are subject only to limited appellate review. Therefore, we must afford this process the broadest of constitutional protection and prevent even the possibility of unfairness.

Goldberg v. Commonwealth of Pennsylvania, State Board of Pharmacy, 49 Pa. Commonwealth Ct. 123, 129-30, 410 A.2d 413, 417 (1980).

Upon review, this court concludes that the proceedings in this matter taken as a whole are so tarnished as to create a clear susceptibility to potential bias against Lawrence. This court concludes that the possibility of unfairness to Lawrence exists and that improprieties might have occurred. Accordingly, we remand this case to the Board for new hearings on the matter. Case remanded for proceedings consistent with this opinion.

MADALINE PALLADINO
Madaline Palladino, *Judge*

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 3062 C.D. 1986

LAWRENCE COAL COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
RESOURCES,
Respondent.

O R D E R

AND NOW, January 25, 1988, the order of the Environmental Hearing Board dated September 19, 1986 in the above-captioned matter affirming the Board's prior May 27, 1986 adjudication is vacated. The case is remanded for further proceedings consistent with this opinion.

Jurisdiction relinquished.

MADALINE PALLADINO
Madaline Palladino, *Judge*

CERTIFIED FROM THE RECORD
AND ORDER EXIT

JAN 25, 1988

C.R. HOSTUTLER
Deputy Prothonotary—Chief Clerk

APPENDIX "E"

Adjudication of the Environmental Hearing Board by Maxine Woelfling, Dated May 27, 1986.

SEAL

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
221 North Second Street
Third Floor
Harrisburg, Pennsylvania, 17101
(717) 787-3483

MAXINE WOELFLING, CHAIRMAN
EDWARD GERJUOY, MEMBER
M. DIANE SMITH
SECRETARY TO THE BOARD

Docket No. 81-021-CP-M

Issued: May 27, 1986

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
RESOURCES

v.

LAWRENCE COAL COMPANY

ADJUDICATION

By the Board

Synopsis

This matter involves a complaint by the Department of Environmental Resources (DER) against Lawrence Coal Company (Lawrence) for the assessment of civil penalties

pursuant to §605 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605 (CSL). It was proven by DER by a preponderance of the evidence that acid mine drainage (AMD) emanated from Lawrence's permit area and that discharges of AMD were caused or affected by Lawrence's mining operations in violation of §§3, 301, 307, 315, and 401 of the CSL and the rules and regulations adopted thereunder at 25 *Pa. Code* §§77.92, 95.1 and 99.33. It was further proven by a preponderance of the evidence that Lawrence failed to install and maintain adequate erosion and sediment controls in violation of §402 of the CSL and 25 *Pa. Code* §102.4.

Section 316 of the CSL does not provide a separate basis of liability in this case because DER has chosen to seek civil penalties rather than issue an order pursuant to §316. Violations of §401 of the CSL do not merge into violations of §§301, 307, and 315 because violating the terms and conditions of a permit issued pursuant to these sections of the CSL is distinct from causing pollution. The discharge violations were continuous because the sampling was sufficiently close in time to establish a continuing AMD discharge.

In calculating a civil penalty, the Board did not consider the cost of restoration of the receiving waters, since DER presented no evidence as to such costs. Damage to the stream was held to be moderate, and certain violations were held to be wilful. Deterrence was also considered by the Board in assessing the penalty.

INTRODUCTION

This action involves a complaint for civil penalties filed on February 25, 1981, by DER against Lawrence for alleged violations of the CSL resulting from Lawrence's strip mining operations in Springfield Township, Fayette County.

Former Board Chairman Dennis J. Harnish presided over eleven days of hearings, which concluded on November 23, 1982. Following Chairman Harnish's resignation from the Board in May, 1983, the case was assigned to hearing examiner Edward R. Casey. Subsequently, the Board ordered the recusal of Mr. Casey for reasons recounted in an earlier Board Opinion and Order (1983 EHB 608), and assigned the case to Board Member Anthony J. Mazullo, Jr.

After the filing by both parties of post-hearing briefs, and the filing by DER of a reply brief, the record was presented for adjudication. Member Mazullo drafted an adjudication for the consideration of the Board. He resigned on January 31, 1986. The Board is adopting his draft adjudication with modifications.

FINDINGS OF FACT

1. The plaintiff is DER, the agency entrusted with the duty to enforce the provisions of the CSL.

2. The defendant is Lawrence, a corporation, which is the permittee of a surface mining operation in Springfield Township, Fayette County, which operation is referred to herein as the Rogers Mill Strip. (T 10).

3. The Rogers Mill Strip is covered by Mine Drainage Permit 3376SM15, which was issued by the Department pursuant to Section 315(a) of the CSL. (T 11).

4. Mine Drainage Permit 3376SM15 was originally issued to William K. Tedesco on November 10, 1976. (T 11).

5. Mine Drainage Permit 3376SM15 was transferred by DER to Lawrence on July 19, 1977. (T 11).

6. Mining Permit 1063-5 is encompassed within the area covered by Mine Drainage Permit 3376SM15. (T 11).

7. Lawrence is the permittee on Mining Permit 1063-5 which was issued by DER pursuant to Section 4(a) of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.*

8. Mining Permit 1063-5 ("MP 5") covers an area of 63 acres and was issued to Lawrence on July 1, 1977. (T 12).

9. Drainage from the Rogers Mill Strip flows to Buck Run and its unnamed tributary. (T 13)

10. Marsolino Coal and Coke, Inc. ("Marsolino") has a mining operation located immediately uphill from the Rogers Mill Strip. This operation is referred to herein as the MP 71-27 Strip. (T 17).

11. The Rogers Mill Strip and the MP 71-27 Strip are the only two surface mining operations on the Buck Run watershed which could have had an impact on the quality of Buck Run and its unnamed tributary in the vicinity of the Rogers Mill Strip. (T 18).

12. There are three township roads in the immediate vicinity of the Rogers Mill Strip. The Rogers Mill Strip is bounded on the northwest by T-687, a paved road, which runs to the Angelo Fish Hatchery and beyond ("Fish Hatchery Road"). The site is bounded on the southeast by T-683, a dirt road, which runs to the residence and spring of Glen Pirl and beyond ("Pirl Spring Road"). The third road is T-685, a dirt road, which runs through the Rogers Mill Strip ("Haul Road"). The Haul Road joins the Pirl Spring Road approximately 150 feet from the intersection of the Pirl Spring Road and the Fish Hatchery Road. There is a bridge on the Fish Hatchery Road which crosses Buck Run and is very near this intersection ("Buck Run Bridge"). (T 22-24, DER Exhibit 1).

13. There are a number of culverts along the Pirl Spring Road which carry water under the road towards Buck Run and the Buck Run tributary. (DER Exhibit 1).

14. Buck Run is to the southeast of the Rogers Mill Strip. The Pirl Spring Road is between the Rogers Mill Strip and Buck Run. Buck Run has a tributary which is located between the main stream of Buck Run and the Pirl Spring Road ("Buck Run tributary"). The Buck Run tributary confluences with Buck Run upstream from the Buck Run Bridge between culverts 2 and 3 on Pirl Spring Road. (DER Exhibit 1).

15. Drainage from culvert 2 flows directly to Buck Run, while drainage from culverts 3 and 4 flows to the Buck Run tributary. (T 54-55).

16. Lawrence mined above the discharges at culverts 2 through 4 along the Pirl Spring Road. (T 298).

17. The area of the site is characterized by moderately steep dipping sedimentary rocks. There is frequent rolling that is at times sudden and severe. (T 713).

18. The rock formations in this area are the Middle and Lower Allegheny rock formations, with the coal seams being the Lower Kittanning through Freeport coal seams. (T 714).

19. The overburden which was mined on the site and which is evidenced by the existing highwall was a highly fractured massive sandstone 50 to 60 feet thick. The sandstone had many joints and fractures, and there were smooth faces where the joints had been weathered. This sandstone has coaly inclusions. The overburden has been fairly consistent throughout the mining operation. (T 145, 717-718).

20. Topographically, the site resembles a tongue with valleys on each side. The tongue has significant relief from the tip of the tongue at the northwest to the top of the hill in the south. The relief from the Angelo hatchery to the top of the area mined by Marsolino is about 500 feet. (T 720-721).

21. Stratigraphically, the Rogers Mill Strip had one coal seam which was mined. That coal seam was covered by a massive sandstone 50 to 60 feet thick. Immediately under the coal was a layer of shale 2 to 15 feet thick. Some 40 to 60 feet below the mined coal seam is a thin coal seam which has been referred to as the rider seam. A few drill holes indicate that there are both sandstones and shales between the mined seam and the rider seam. (T 731, 1167; DER Exhibits 34, 39; Lawrence Exhibits 5, 6, 7, and 8).

22. Structurally, the mined coal seam was fairly uniform. (T 732). The mined coal seam dipped to the northwest and in a northeast to southwest direction. The seam, or the underpavement remaining, has a moderate uniform dip beginning on the Marsolino site (MP—27 Strip) and dipping uniformly until the area of the Haul Road where there was a roll in the coal. At the roll, the dip flattens somewhat but still dips to the northwest. (T 734-735).

23. The general recharge area for the Rogers Mill Strip is the topographic high, which is the whole area of sandstone uphill from the site to the uphill cropline of the sandstone. (T 736-739).

24. The general discharge area is the lower end of the tongues, which is the west and northwest area bounded by the Pirl Spring Road and the Fish Hatchery Road. This would cover the area from the north and south WPA seals at the Angelo Hatchery along the crop line and below it along the Hatchery Road and along the Pirl Spring Road up as far as the Marsolino site. (T 737, 745-746).

25. The primary controls on groundwater flow at the Rogers Mill Strip are the topography, structure, and stratigraphy of the site. (T 747-748).

26. On the reclaimed area of the surface mine, infiltrating water will flow to the pit floor. The flow will then be controlled primarily by structure, with groundwater flowing downdip perpendicular to contour lines until it reaches a crop line where it will discharge. (T 769-770, 771).

27. The flow of the pit on the Rogers Mill Strip dips in two directions, towards the Fish Hatchery Road and towards the Pirl Spring Road. The component of dip

towards the Pirl Spring Road was steeper in the area closer to the Pirl Spring Road than it was in area of the pit at the time of the view. In that area the dip towards the Pirl Spring Road was steeper than the dip towards the Fish Hatchery Road. (T 260-261).

28. Discharges can occur anywhere along the north and west croplines of the Rogers Mill Strip depending on local rolls and undulations. (T 776).

29. The floor of the pit on the Rogers Mill Strip was not perfectly flat. (T 1493).

30. The roll in the pavement of the mined site channels water towards culvert 4 on the Pirl Spring Road, and water following this course discharges at the dead tree above culvert 4, which is below the cropline of the mined seam. (T 798).

31. The Rogers Mill Strip produces AMD. (T 794, 1024).

32. Lawrence's mining operation is a source of the toe of spoil discharge at the dead tree above culvert 4. (T 1632-1633).

33. Lawrence's mining operations at the Rogers Mill Strip have contributed to the discharge of mine drainage at the toe of spoil on MP 5 near the dead tree above culvert 4. (T 1632-1633).

34. There are no logical sources of the AMD at the culverts along T-683 except the Lawrence and Marsolino surface mines. (T 871-873).

35. Lawrence and Marsolino both mined the same coal seam. (T 1326-1327).

36. Outcrop areas, such as the area of the Rogers Mill Strip along the Pirl Spring Road, are normally fractured. (T 1614).

37. It is common for water to pass through coal crop lines. (T 1617).

38. Flows of water at culverts 2, 3, and 4 were greatly reduced after the toe of spoil mine drainage collection ditch and the two treatment ponds on MP 5 were constructed. (T 224-226, 495).

39. The quality of the seep of mine drainage into the toe of spoil collection ditch and the water seeping out of the road bank between culverts 4 and 5 is similar in most respects. (DER Exhibit 33A).

40. There is a hydrologic connection between the Rogers Mill Strip and the acid mine drainage discharges at culverts 2, 3 and 4. (T 720-721, 731, 734-735, 747-748, 871-873, 1632-1633; DER Exhibits 33, 33A, 33B, 33C).

41. There are discharges of AMD from the zone between the mined seam and the rider seam. These discharges exist or existed in the vicinity of culverts 2, 3, 4, 6, and 7 along the Pirl Spring Road. There are also discharges from this zone at culverts 8, 9, 10 and the Pirl Spring, but they are not AMD. (DER Exhibits 33A and 33B).

42. The AMD which flowed to culvert 2 on the Pirl Spring Road flowed from the culverts directly to Buck Run, and the AMD which flowed to culverts 3 and 4, flowed from those culverts to the Buck Run Tributary. (T 54-55).

43. The observable source of the water that flowed to culverts 2 and 3 on January 23, 1980 was a swampy area located below the toe of spoil of the Rogers Mill Strip, in the area of the present location of the MP 5 treatment ponds. This swampy area dried up some time after the treatment ponds were constructed. The volume of these

discharges decreased significantly after the toe of spoil AMD collection ditch and the treatment ponds were constructed on MP 5. (T 52, 224-226, 491-492, 495, 501; DER Exhibit 33A).

44. The observable source of the water that flowed to culvert 4 on January 23, 1980 was an area at the toe of spoil of the Rogers Mill Strip in the vicinity of a dead tree above culvert 4. Water continued to flow above ground from the toe of spoil area to culvert 4 until a toe of spoil ditch was constructed by Lawrence. The toe of spoil ditch was originally constructed some time between May 27, 1980 and June 10, 1980. After the construction of the ditch, the flow of water at culverts 3 and 4 greatly reduced. (T 51-52, 170, 224-226, 491, 495).

45. There is nothing between the sources of the culvert discharges and the culverts which would alter the chemical character of the water. (T 887).

46. DER's file for the Rogers Mill Strip does not indicate that there were any pre-mining pollutional discharges below the Rogers Mill Strip along the Pirl Spring Road. (T 25-28).

47. Lawrence never performed field tests or laboratory tests of the mine drainage at the culverts along the Pirl Spring Road prior to the time DER Inspector Mark Frederick first sampled them. (T 1512-1513, 1642).

48. The water quality at culverts 8, 9, 10, and the Pirl Spring represents background or ambient water quality for the area of the Rogers Mill Strip. (T 499-500).

49. The background water quality concentration for sodium is less than 1ppm. (T 594-595).

50. On January 23, 1980, Lawrence was not treating the AMD that flowed to culverts 2, 3 and 4 along the Pirl Spring Road. (T 55).

51. On January 23, 1980, parameters sampled in the mine drainage at culvert 4 had the following concentrations (values, except for pH, are hereinafter expressed in milligrams per liter): the pH was 3.2; the acidity of 618 exceeded the alkalinity of 0; iron was 32.3; and manganese was 56. (T 40; DER Exhibits 33, 33A).

52. On January 23, 1980, the parameters sampled in the mine drainage at culvert 3 had the following concentrations: the pH was 3.7; acidity of 891 exceeded alkalinity of 0; and manganese was 140. (T 47; DER Exhibits 33 and 33A).

53. On January 23, 1980, parameters sampled in the mine drainage at culvert 2 had the following concentrations: the pH was 4.5; acidity of 150 exceeded alkalinity of 0; and manganese was 41. (T 48; DER Exhibit 33A).

54. On January 23, 1980, Lawrence exceeded the applicable effluent limits for pH, acidity, and manganese at culverts 2, 3, and 4, and the applicable effluent limit for iron at culvert 4.

55. On January 28, 1980, DER Inspector Frederick inspected the Rogers Mill Strip and was accompanied by Archie Johnson, the foreman at the strip. On that date the discharges at culverts 2 through 4 were flowing but were not sampled. Lawrence was not collecting or treating the discharges on January 28, 1980. (T 71-72).

56. Inspector Frederick inspected the Rogers Mill Strip on February 28, 1980, and was accompanied by Archie Johnson and James Filiaggi, the superintendent of Lawrence's mining operations. (T 73, 1625).

57. On February 28, 1980, Lawrence was not treating the mine drainage flowing to culverts 2, 3, and 4. (T 79).

58. On February 28, 1980, parameters sampled in the mine drainage at culvert 2 had the following concentrations: the pH was 4.5; the acidity of 165 exceeded the alkalinity of 0; and the manganese was 41.7. (T 76; DER Exhibit 35A).

59. On February 28, 1980, parameters sampled in the mine drainage at culvert 3 had the following concentrations: the pH was 3.8, the acidity of 971 exceeded the alkalinity of 0, the iron was 20.6, and the manganese was 130. (T 76-77; DER Exhibit 33A).

60. On February 28, 1980, parameters sampled in the mine drainage at culvert 4 had the following concentrations; the pH was 2.9, the iron was 81.4, the acidity of 1032 exceeded the alkalinity of 0, and the manganese was 93. (T 75-77; DER Exhibit 33A).

61. On February 28, 1980, Lawrence exceeded the applicable effluent limits for pH, acidity, and manganese at culverts 2, 3, and 4, and the applicable effluent limit for iron at culverts 3 and 4.

62. On March 20, 1980, DER Inspector Frederick observed mine drainage flowing to culverts 2, 3, and 4. Inspector Frederick did not collect samples for laboratory analysis, but did measure the pH of the discharges at the site on that day. the pH's of all the discharges were less than 4.5. (T 90-91).

63. On March 20, 1980, Lawrence violated the applicable effluent limit for pH at culverts 2, 3, and 4.

64. On May 13, 1980, the mine drainage at culvert 2 was being treated by Lawrence, and it had the following concentrations of these parameters: the pH was 9.8; the manganese was 32.78; and the TSS was 753. (DER Exhibit 33A).

65. On May 13, 1980, the mine drainage at culvert 3 was being treated by Lawrence, and it had the following concentrations of these parameters: the manganese was 130 and the TSS was 490. (DER Exhibit 33A).

66. On May 13, 1980, the mine drainage at culvert 4 was being treated by Lawrence, and it had the following concentrations of these parameters: the iron was 23.6; the manganese was 52.7; and the TSS was 604. (DER Exhibit 33A).

67. On May 13, 1980, Lawrence exceeded the applicable effluent limits for manganese and TSS at culverts 2, 3, and 4; the applicable effluent limit for pH at culvert 2; and the applicable limit for iron at culvert 4.

68. On May 21, 1980, Lawrence was not treating the mine drainage at culverts 2, 3, and 4. (T 147).

69. On May 21, 1980, the mine drainage at culvert 2 had the following concentrations of these parameters: the pH was 4.3; the acidity of 37 exceeded the alkalinity of less than 10; and the manganese was 21.8. (T 148; DER Exhibt 33A).

70. On May 21, 1980, the mine drainage at culvert 3 had the following concentrations of these parameters: the pH was 4.2; the acidity of 145 exceeded the alkalinity of less than 10; and the manganese was 115. (T 149; DER Exhibit 33A).

71. On May 21, 1980, the mine drainage at culvert 4 had the following concentrations of these parameters: the pH was 4.3; the acidity of 830 exceeded the alkalinity of less than 10; and the manganese was 23. (T 149; DER Exhibit 33A).

72. On May 21, 1980, Lawrence exceeded the applicable effluent limits for pH, acidity, and manganese at culverts 2, 3, and 4.

73. Lawrence admits that some of the mine drainage collected by the toe of spoil collection ditch is from its mining operation. (T 488, 1628, 1632-1633).

74. On June 10, 1980, the mine drainage at culvert 2 was treated by Lawrence but nevertheless had the following concentrations of these parameters: the manganese was 44.7 and the TSS was 112. (T 172-173; DER Exhibits 33A).

75. On June 10, 1980, the mine drainage at culvert 3 was treated by Lawrence but nevertheless had the following concentrations of these parameters: the iron was 5.8; the manganese was 305; and the TSS was 4,150. (DER Exhibit 33A).

76. On June 10, 1980, the mine drainage at culvert 4 was treated by Lawrence but nevertheless had the following concentrations of these parameters: the pH was 5.2; the manganese was 24.2; and the TSS was 178. (DER Exhibit 33A).

77. On June 10, 1980, Lawrence exceeded the applicable effluent limits for manganese and TSS at culverts 2, 3, and 4; the applicable effluent limit for iron at culvert 3; and the applicable effluent limit for pH at culvert 4.

78. On or about June 20, 1980, Lawrence deepened and extended the toe of spoil collection ditch which was intended to intercept the mine drainage at the dead tree. The toe of spoil collection ditch is in rubbly material and is not impermeable. (T 184, 851; DER Exhibits 14I, J, K, L, M, and N).

79. The second treatment pond was built on MP 5 on or about July 1, 1980. A major portion of the waste that flowed to culverts 3 and 4 was intercepted by the toe of spoil collection ditch and the treatment ponds on MP 5. (T 194, 199, 489).

80. On July 7, 1980, Lawrence was not treating the discharges at culverts 2, 3, or 4. (T 223-224).

81. On July 7, 1980, the mine drainage at culvert 2 had the following concentrations of these parameters: the pH was 4.4; the acidity of 179 exceeded the alkalinity of 0; and the manganese was 56. (T 223-225; DER Exhibit 33A).

82. On July 7, 1980, the mine drainage at culvert 4 had a very low flow and, as a result, no sample was collected for analysis. However, the mine drainage did have a field pH of less than 4.5. (T 225).

83. On July 7, 1980, Lawrence exceeded the applicable effluent limits for pH at culverts 2 and 4, and the applicable effluent limits for acidity and manganese at culvert 2.

84. On July 22, 1980, Lawrence was treating the discharges at culverts 2, 3, and 4 with sacks full of soda ash briquettes placed in the road ditch. There were no facilities to settle out suspended solids. (T 226-227).

85. On July 22, 1980, notwithstanding that it was being treated, the mine drainage at culvert 2 had the following concentrations of these parameters: the manganese was 28.5 and the TSS was 100. (DER Exhibit 33A).

86. On July 22, 1980, the mine drainage at culvert 3 was being treated, but nevertheless had the following concentrations of these parameters: the manganese was 103 and the TSS was 402. (DER Exhibit 33A).

87. On July 22, 1980, the mine drainage at culvert 4 was being treated, but nevertheless had the following concentrations of these parameters: the pH was 10.1; the manganese was 9.9; and the TSS was 264. (DER Exhibit 33A).

88. On July 22, 1980, Lawrence exceeded the applicable effluent limits for manganese and TSS at culverts 2, 3, and 4 and the applicable effluent limit for pH at culvert 4.

89. On August 14, 1980, the mine drainage at culvert 2 had the following concentrations of these parameters: the pH was 4.4; the acidity of 150 exceeded the alkalinity of 1; and the manganese was 49. (T 237-238; DER Exhibit 33A).

90. On August 14, 1980, the mine drainage at culvert 4 had the following concentrations of these parameters: the pH was 4.4; the acidity of 150 exceeded the alkalinity of 8; and the manganese was 19.16. (DER Exhibit 33A).

91. On August 14, 1980, Lawrence exceeded the applicable effluent limits for pH, acidity, and manganese at culverts 2 and 4.

92. On October 3, 1980, samples of the mine drainage at culverts 2, 3 and 4 were not collected. However, the field pH's for the drainage at culverts 2, 3, and 4 were all less than 5. (T 250).

93. On October 3, 1980, Lawrence exceeded the applicable effluent limit for pH at culverts 2, 3, and 4.

94. In order to effectively treat AMD, it must be neutralized first and then directed to settling basins for the metals to settle out. (T 1621).

95. The treatment which Lawrence provided for the AMD at culverts 2, 3 and 4, by placing soda ash briquettes in the road ditch, and for the dead tree toe of spoil discharge by placing soda ash briquettes in the channel in which it flowed to culvert 4, was not effective to treat the AMD. (T 226-227, 1621).

96. Lawrence constructed a siltation control ditch on the Rogers Mill Strip (MP 5) some time between May 27, 1980 and June 10, 1980. (T 170).

97. Prior to the construction of a siltation control ditch on the Rogers Mill Strip (MP 5), there was an absence of adequate erosion and sedimentation controls at the site. (T 170, 363, 366, 1635-1637).

98. On May 12, 1980, there was a heavy rainfall at the site, which resulted in muddy water running off the site at two places, just above culvert 4 and down the Haul Road; a siltation control ditch would have collected the muddy water and conveyed it to sedimentation basins. (T 95-96; DER Exhibit 7).

99. Buck Run is classified at 25 Pa. Code §93.9 as a high quality cold water fishery.

100. Buck Run is a relatively lightly buffered stream which does not have a great ability to assimilate acid. (T 419-420).

101. Iron contained in AMD had a very negative effect on aquatic life where iron precipitation occurs. Precipitation occurs where the AMD enters a stream and is neutralized. The neutralization of AMD causes the formation of insoluble iron hydroxides which settle out, coat and stain the substrate. The staining interferes with the living space of aquatic organisms on the substrate intself and interferes with the ability of the organisms to exchange oxygen.

102. The acid in AMD is directly toxic to fish and aquatic organisms. It irritates the gills of aquatic organisms which react by secreting a mucus; this interferes with their ability to exchange oxygen and carbon dioxide and they die.

103. Mine drainage with very low pH has the same effect on aquatic organisms as acid. (T 433).

104. Siltation can cause damage to aquatic life in two ways: (i) small amounts of sediment over time could smother a stream's habitat; and, (ii) one high concentration of abrasive sediment could result in an instant fish kill. (T 438).

105. On March 20, 1980, Karl Shaeffer, a water pollution biologist with DER, conducted a macro-invertebrate study of Buck Run above and below the area affected by drainage from Lawrence's and Marsolino's surface mines. (T 386, 398-403).

106. On March 20, 1980, there was a well established macro-invertebrate community in Buck Run above the area affected by drainage from Lawrence's and Marsolino's surface mining, which community included many taxa of pollution sensitive invertebrates, including mayflies, stoneflies and caddisflies, whereas, in the area

near the Buck Run Bridge, the macro-invertebrate community was almost nonexistent and there was iron staining. (T 401-403).

107. The staining observed in Buck Run is iron hydroxide precipitate which occurs commonly when AMD enters a stream and is neutralized; it has an orange tint and is often referred to as "yellowboy." (T 407-408).

108. On May 12, 1980, Buck Run above Lawrence's and Marsolino's mines had clear water and there was no coating (of precipitates) on the substrate, whereas below the mines, the water was turbid and there was visible orange staining on the rocks. (T 101, 114-115).

109. On May 12, 1980, discharges from the Rogers Mill Strip and the MP-27 Strip impacted the water quality of Buck Run and the Buck Run tributary because, even though Lawrence and Marsolino were treating their discharges, they did not employ facilities to settle out the metals and they were precipitating out in the stream. (T 101, 116-117).

110. On May 12, 1980, the total solids level of Buck Run near the Rogers Mill Bridge increased from 142mg/1 before a rainstorm to 16,076 mg/1 after the rainstorm. (T 120; DER Exhibit 8).

111. On May 21, 1980, the physical appearance of Buck Run showed that it was continuing to be degraded by AMD. The unnamed tributary to Buck Run was very yellow and turbid at its mouth, and Buck Run below both tributaries was cloudy with iron staining on the substrate. Whereas, upstream of the tributary, Buck Run was very clear. (T 150-151).

112. On July 1, 1980 Lawrence was treating the water at culverts 2, 3 and 4, but did not settle out the metals. (T 198-201).

113. On October 3, 1980, the fish community in Buck Run in the area of the Buck Run Bridge was depressed because of the adverse impact of AMD and siltation, in spite of the fact that that area, with its pools and ripples, is a good habitat for fish. Electrofishing in a 75 yard area upstream from the bridge yielded three trout, whereas, electrofishing in a 75 yard area above the influence of mining yielded approximately seventy-five (75) trout and other associated species. (T 414-416).

114. When DER's water polution biologist visited Buck Run in March and October, 1980, there was an abrupt change in the aquatic life in Buck Run below the Buck Run tributary as compared to above it. The differences in the aquatic communities of Buck Run downstream and upstream of Lawrence's and Marsolino's mining operations can be attributed to those operations. (T 419, 438).

115. During the period of January 28, 1980 to October 10, 1980, the physical, chemical and biological condition of Buck Run and the Buck Run tributary was degraded by discharges of AMD and sediment from Lawrence's and Marsolino's surface mines; Lawrence contributed to the degradation of Buck Run and the Buck Run tributary. (T inclusive).

116. Buck Run and the Buck Run tributary could not begin to recover until the discharges of AMD and siltation from Lawrence's and Marsolino's operations were eliminated. (T 466).

117. In May of 1981, there was some improvement in the aquatic community and stream quality in the area of Buck Run below the Buck Run tributary; however, recovery was not complete. Most of the coating of the substrate was washed away. (T 448-454).

118. Between May, 1981 and May, 1982, Buck Run continued to recover in quality; this improvement can be attributed to the corrective measures taken by Lawrence and Marsolino concerning the AMD and siltation from their mining sites. (T 456-458).

119. In 1982, it was estimated that it would take approximately 3 to 5 years for Buck Run to completely recover from the damage that was done in 1980. (T 460-461).

120. Lawrence is the permittee of a surface mining operation in Dunbar Township, Fayette County, which is covered by Mine Drainage Permit 3378BC10 and Mining Permit 1063-8. (The "Spruell Strip") (T 264).

121. On September 4, 1980, Lawrence failed to implement and maintain adequate erosion and sedimentation controls at the Spruell Strip. (T 264, 269).

122. On September 4, 1980, there was a discharge of AMD from the Spruell Strip which had the following concentrations of these parameters: the pH was 2.9; the acidity of 564 exceeded the alkalinity of 0; the iron was 35.8; and the maganese was 5.3. (T 274; DER Exhibit 33).

123. On September 4, 1980, Lawrence exceeded the applicable effluent limits for pH, acidity, iron, and manganese in its discharge from the Spruell Strip.

124. Drainage from the Spruell Strip enters a tributary of Morgan Run. (T 274).

DISCUSSION

In this civil penalties action, DER bears the burden of proving by a preponderance of the evidence that Lawrence violated applicable statutes and that there is a basis for the Board to assess civil penalties. 25 Pa. Code §21.101(a); 21.101(b)(1); *DER v. Federal Oil and Gas Co. and James V. Joyce, t/d/b/a Joyce Pipeline Co.*, 1975 EHB 186. DER has met its burden with respect to most of the violations set forth in both DER's complaint and DER's amended complaint. However, before addressing the details of those proven violations, and Lawrence's responsibility for them, we will consider DER's still pending motion to amend its complaint to conform to proof.

Amendment of DER's Complaint

DER's original complaint covered violations which occurred as a result of Lawrence's strip mining operations at three sites in Fayette County, the Rogers Mill Strip, located in Springfield Township and covered by mining permit no. 1063-5; the Spruell Strip, located in Dunbar Township and covered by mining permit no. 1063-8; and the Kennedy Strip, located in Dunbar Township and covered by mining permit no. 1063-7.

At the first hearing, held on June 2, 1982, the parties restated an earlier stipulation which confirmed that this action did not cover alleged violations which occurred as a result of Lawrence's mining operations at the twenty (20) acre area covered by mining permit no. 1063-5(A), which is adjacent to the sixty-three (63) acre area covered by mining permit no. 1063-5. (T 3-6). These two sites are collectively referred to as the Rogers Mill Strip.

Subsequently, during the course of the hearing held on June 3, 1982, DER at first offered to withdraw the portions of its original complaint that dealt with "the other sites [located] in Dunbar Township." (T 265). This reference was to the sites covered by mining permit nos. 1063-7 and 1063-8, the Kennedy Strip and the Spruell Strip, respectively. However, following an on-the-record dispute between the parties concerning the fact that deletion of the applicable paragraphs of DER's complaint (nos. 18(b) and 27) would not suffice due to their incorporation by reference into other paragraphs of DER's complaint, counsel for DER rescinded the offer to withdraw the aforementioned paragraphs by orally moving the Board to amend the complaint to include them. (T 267). While agreeing with counsel for Lawrence that the violations alleged in paragraphs 18(b) and 27 were de minimis, counsel for DER nonetheless pursued the motion to amend. However, the Board deferred ruling on DER's motion, noting that it would be appropriate for DER to move to amend the complaint to conform to the proof after the proof had been put in the record. (T 268). DER followed the Board's recommendation by filing such a motion on March 28, 1983, four months after the conclusion of the hearing. (Lawrence's answer to DER's motion raises only one ground for denial of DER's motion, namely, the dilatory filing of it.)

In its motion, DER requested the Board to allow amendment of its complaint to cover violations on the sites covered by mining permits 1063-8 and 1063-5(A). The Hearing Examiner, former Board Chairman Harnish, denied DER's motion to amend its complaint concerning permit no. 1063-5(A). (T 509). Furthermore, because DER stipulated on the first day of hearings that this civil penalties action did not cover alleged violations which

occurred as a result of Lawrence's mining on the area encompassed by mining permit 1063-5(A), we will not allow DER to renege on that stipulation at this late stage in the proceedings. Therefore, alleged violations related to operations on the area covered by mining permit 1063-5(A) are not at issue herein.

With regard to DER's other proffered amendment, concerning a violation on September 4, 1980, at the area covered by mining permit 1063-8, the Spruell Strip, we will allow the amendment in view of the fact that DER's original complaint included a count which alleged a violation at the Spruell Strip on September 4, 1980. The only difference between DER's original complaint and its amended complaint, concerning the September 4, 1980 violation at the Spruell Strip, is that DER incorrectly listed Buck Run as the receiving stream in its original complaint. In its amended complaint, DER does not cite a specific receiving stream, but the record indicates that the receiving stream of discharges from the Spruell Strip is a tributary of Morgan Run. (See Finding of Fact No. 123).

Our grant of the amendment concerning the Spruell Strip violation on September 4, 1980 comports with Pa. R.C.P. No. 1033[1] which provides:

[a] party, either by filed consent of the adverse party or by leave of court, *may at any time* change the form of action, correct the name of a party or amend his pleading. The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense. *An amendment may be made to conform the pleading to the evidence offered or admitted.* (emphasis added).

[1] With regard to pleadings, the Pennsylvania Rules of Civil Procedure are made applicable to proceedings before the Board by virtue of the Board's rules of practice and procedure. 25 Pa. Code §21.64.

It is well-settled in Pennsylvania that a court has the discretion to grant amendments to pleadings and that it should be liberally exercised except where surprise or prejudice to a party would result. *Biglar v. Biglar*, 330 Pa. Super. 512, 479 A2d 1021, 1024-26 (1984). In the instant case, Lawrence had notice, by virtue of DER's original complaint, of the September 4, 1980 violation at the Spruell Strip; thus, the element of surprise is not present. Allowance of DER's amendment, changing Buck Run to waters of the Commonwealth, does not prejudice Lawrence for the reasons noted above.

Finally, with regard to amendments of DER's complaint, we note that DER has not moved the Board to amend the complaint to conform to the proof concerning an alleged violation which occurred at the area covered by mining permit no. 1063-7, the Kennedy Strip. Therefore, because of the omission, the alleged violation at the Kennedy Strip is not at issue herein.

Basis for Liability

This civil penalties action has been brought by the Department pursuant to Section 605 of the CSL; more specifically, it has been brought pursuant to the version of the CSL which was in effect prior to the amendment of the statute by Act 157 of 1980, since the violations complained of occurred prior to October 10, 1980, the effective date of Act 157. All provisions of the CSL cited in this adjudication will be those in effect at the time of the violations.

Section 605 provided, in part, that:

> In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this act, rule, regulation, order of the department, or a condition of any permit issued

> pursuant to this act, the department, after hearing, may assess a civil penalty upon a person or municipality for such violation. Such a penalty may be assessed whether or not the violation was wilful. The civil penalty so assessed shall not exceed ten thousand dollars ($10,000) per day for each violation. In determining the amount of the civil penalty the department shall consider the wilfullness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors.

The Department has alleged that Lawrence violated §§3, 301, 307, 315, and 401 of the CSL and the rules and regulations adopted thereunder at 25 *Pa. Code* §§77.92, 95.1, 99.33 and 102.4.

Section 3 of the CSL generally declared that the "discharge of. . .industrial waste. . .into the waters of this Commonwealth, . . . which causes or contributes to pollution as herein defined or creates a danger of pollution is hereby declared. . .to be a public nuisance." Section 301 stated

> No person or municipality shall place or permit to be placed, or discharged or permit to flow, or continue to discharge or permit to flow, into any of the waters of the Commonwealth any industrial wastes, except as hereinafter provided in this act.

Industrial waste was defined in §1 of the CSL to include mine drainage. The conditions placed upon mine drainage discharges were set forth in §§307 and 315. Section 307 generally imposed conditions upon the discharge of industrial waste:

> No person. . .shall discharge, or permit the discharge of industrial wastes in any manner directly or indirectly, into any of the waters of the Commonwealth unless such discharge is authorized by the rules and regulations of the board or such

> person has first obtained a permit from the department... A discharge of industrial wastes without a permit or contrary to the terms and conditions of a permit or contrary to the rules and regulations of the board is hereby declared to be a nuisance.

Section 315 of the CSL dealt more specifically with the operation of mines, providing that:

> No person or municipality shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the board or such person or municipality has first obtained a pemit from the department...

And, Section 401 of the CSL proscribed the discharge of "any substance of any kind or character resulting in pollution..."

The regulations contained at 25 Pa. Code §§77.92, 95.1, and 99.33 contain effluent limitations applicable to coal mining activities. Section 95.1, which contains general treatment requirements for all wastewater discharges, states that wastewater discharges are subject to the treatment requirements established pursuant to §§301 and 304 of the Clean Water Act, 33 U.S.C. §§1311 and 1314 and also to those treatment requirements set forth in Title 25. The treatment requirements established under the Clean Water Act were contained at 40 C.F.R. 434.32(a) and provided the following:

> Total iron—7 mg/1 maximum and 3.5 mg/1 for a 30 day average
>
> Total manganese—4 mg/1 maximum and 2 mg/1 for a 30 day average
>
> Total suspended solids—70 mg/1 maximum and 35 mg/1 for a 30 day average
>
> pH—within the range 6.0 to 9.0

The effluent limitations to which mine drainage discharges were subject under Title 25 were set forth at §77.92 and 99.33.[2] Section 77.92(c) provides in pertinent part:

> *Water Quality Criteria*
>
> 1. The permittee shall take all necessary precautions to prevent the discharge of avoidable silt, coal mine solids, rock debris, dirt and clay into the receiving stream as required by the current Erosion and Sediment Control Regulations of the Department.
>
> 2. The permittee shall at no time discharge to the waters of the Commonwealth mine drainage from any source the pH of which is less than six (6.0) or greater than nine (9.0).
>
> 3. The permittee shall at no time discharge to the waters of the Commonwealth mine drainage containing a concentration of iron in excess of seven (7) milligrams per liter.
>
> 4. The permittee at no time shall discharge to the waters of the Commonwealth mine drainage the acid content of which, as determined by a pH value of eight (8.0) by the hot phenolphthalein test exceeds its alkaline content as determined to pH of four (4.0) by the bromphenol blue test.

Section 99.33 provided:

> (a) Acid. There shall be no discharge of mine drainage which is acid.
>
> (b) Iron. There shall be no discharge of mine drainage containing a concentration of iron in excess of seven milligrams per liter.
>
> (c) pH. The pH of discharges of mine drainage shall be maintained between 6.0 and 9.0.

---

[2] Both of these regulations as applied to coal mining operations have since been repealed.

(d) Exceptions. The Board shall grant an exception to any of the limitations in subsections (a)—(c) of this section only when the operator has affirmatively demonstrated that operation under the proposed exception would not cause pollution to waters of this Commonwealth.

(e) Specific limitations. At the request of the reporting agency, or on its own motion, the Board may require more stringent requirements than those listed in subsections (a)—(c) of this section including specific limitations as to other constituents of mine drainage, such as aluminum, sulphates, manganese and the like.

Section 102.4 relates to erosion and sediment control and provides in relevant part:

(a) All earthmoving activities within this Commonwealth shall be conducted in such a way as to prevent accelerated erosion and the resulting sedimentation. To accomplish this, except as provided in subsection (b) of this section, any landowner, person, or municipality engaged in earth—moving activities shall develop, implement, and maintain erosion and sedimentation control measures which effectively minimize accelerated erosion and sedimentation.

The Department has also urged that §316 of the CSL is applicable to this proceeding. At the time of these alleged violations, §316 provided, in part, that:

Whenever the Sanitary Water Board finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth, the board *may order* the landowner or occupier to correct the condition in a manner satisfactory to the board of *it may order* such owner or occupier to allow a mere operator or other person or agency of the Commonwealth access to the land to take such action. (emphasis added).

Section 316 does indeed provide a separate basis for liability, *Commonwealth v. Barnes and Tucker Company*, 453 Pa. 392, 400, 319 A.2d 871, 876 (1974), but in this case the Department has chosen to proceed by way of a complaint for civil penalties, rather than the issuance of an order pursuant to §316. Consequently, our decision is not based upon §316 considerations.

There are several legal principles under which Lawrence may be held responsible for the discharges in question. Lawrence is responsible for all mine drainage which originates on or flows through its permitted area. *Commonwealth v. Harmar Coal Co.* 452 Pa. 27, 306 A.2d 308 (1973) and *Hawk Contracting, Inc. and Adam Eidemiller, Inc. v. DER*, 1981 EHB 150. And, Lawrence is responsible for all discharges of mine drainage which were either caused or affected by Lawrence's mining operations, *Hawk Contracting, Inc., supra*, and *Adam Greece d/b/a Cherry Run Fuel Company v. DER*, 1980 EHB 135. Our review of the voluminous record indicates that DER established that Lawrence was responsible for the discharges from the Rogers Mill and Spruell strips under either or both of these priciples and did commit the cited violations on the noted dates.

Regarding Lawrence's responsibility for discharges from its permitted area, it has been established that from January 23, 1980, until the second treatment pond was built on MP 5 on or about July 1, 1980, the discharges which were sampled at culverts 2 and 3 originated in the swampy area that was either on or very near to the boundary of the permit area. Also, prior to construction of the toe of spoil AMD collection ditch by the dead tree on MP 5, the dead tree discharge flowed above the ground from the point of the strip where it surfaced at the toe of spoil to culvert 4. After the construction of the

MP 5 ponds and the toe of spoil ditch, the flows at culverts 2, 3 and 4 were greatly reduced, but not eliminated. Reduced amounts of AMD continued to discharge at these points because the treatment ponds and the toe of spoil ditch were not impermeable and because the toe of spoil ditch was not deep enough to intercept all the AMD which flows towards the Pirl Spring Road from the area mined by Lawrence. Since all the AMD discharges at culverts 2, 3 and 4 originated on Lawrence's site, Lawrence was responsible for abating or collecting and treating them. Lawrence is similarly responsible for the September 4, 1980, discharge from the Spruell Strip.

Lawrence is also responsible for all discharges emanating on or off its mining site which were either caused or affected by Lawrence's mining operations if a causal connection can be established between Lawrence's operations and the discharges. There is no dispute in the testimony that the Rogers Mill Strip produces AMD. Furthermore, a causal connection between Lawrence's operations and the discharges is established by both direct and circumstantial evidence. The discharges at culverts 2, 3 and 4 originated on the Lawrence site. A causal connection after the construction of the toe of spoil ditch and the second MP 5 treatment pond exists because these structures were not impermeable and because the toe of spoil ditch was not dug deep enough to intercept all the AMD flowing from the Rogers Mill Strip towards the Pirl Spring Road because it was not dug all the way to the rider seam. The fact that the flows decreased at culverts 2, 3 and 4 after construction of the toe of spoil ditch and the second treatment pond on MP 5 is evidence of a hydrologic connection between the discharges at the culverts and the site, as the ditch and ponds are between the structures and the discharges. If

there were no hydrologic connection, the flows at the culverts would not have been reduced. Some flow continues at the culverts because the ponds and ditch do not intercept and hold all the AMD which flows from the site towards the culverts.

The discharges at culverts 2, 3 and 4 are AMD and there is no other logical source of AMD which would flow to those culverts, except the surface mines at Lawrence's Rogers Mill Strip and Marsolino's MP-27 Strip. There are no other active or abandoned surface or deep mines in the recharge area for the culverts. There are not any oil or gas wells in the area, and the water quality does not represent ground water contaminated by oil or gas wells. Finally, the quality of the discharges at culverts 2, 3 and 4 is not consistent with ambient water quality in the area. The sulfates in the culvert discharges, as well as the high acidity, manganese and aluminum distinguish it from the ambient water quality which is represented by the water at culverts 8, 9, 10 and the Pirl Spring and, to some extent, by the water in the drill holes above the highwall.

An additional indication that the water quality of the culvert discharges changed after mining commenced is the change in the quality of Buck Run and Buck Run Tributary in the area which received drainage from the culverts. Before mining, the area was a high quality trout stream which was stocked by the Fish Commission. After mining commenced, the stream became degraded and was no longer stocked. After Lawrence and Marsolino improved their collection and treatment of the discharges, the water quality in the stream improved. If the discharges had been bad prior to mining, Buck Run and Buck Run Tributary would have been degraded before mining.

Hydrogeological evidence also establishes a causal connection between the discharges and Lawrence's operations. Drainage was occurring through or over the crop line barrier of the mined seam, which was probably not intact, and then ultimately to the culverts. Groundwater is flowing toward the fractured, rubbly area and out at the culverts. There is also evidence that AMD is migrating vertically.

Lawrence has asserted that if civil penalties are to be imposed under §605 of the CSL, any asserted violations under §401 are merged into and with the §605 provisions, such that separate civil penalties are inappropriate under Section 401. The basis of Lawrence's argument is that violations of Sections 307 and 315 of the CSL and of Section 401 are "different ways of saying the same thing." (Appellant's Post-Hearing Brief, p. 52). DER argues that violations encompassing discharges are distinct and different from violations for polluting. (Commonwealth's Reply to Post-Hearing Brief of Lawrence Coal, p. 5, 6). We are of the opinion that the attempt by Lawrence to invoke the doctrine of merger in this appeal by the linkage of the word "pollution" to the various sections of the CSL which DER maintains have been violated is an unreasonbable interpretation of those sections. (See discussion in Lawrence's Post-Hearing Brief at p. 52). While the violation of the terms and conditions of a permit, and therefore, in this case, §§307 and 315 of the CSL, may result in pollution of the waters of the Commonwealth, there is a separate reason for the creation and administration of a permit system. In regulating an activity through a permit system, one seeks to prevent the occurrence of pollution by prescribing various conditions for the undertaking of the activity. The regulator also seeks to impose uniform conditions, wherever possible, on similar activities.

Section 401 is a broad proscription against any pollution, no matter what the source or no matter whether the substance is regulated through a permit program. Thus, the violations of §§307 and 401 are separate violations.

Lawrence has also asserted that Section 401 of the CSL is, by definition, an improper basis for the imposition of civil penalties in this appeal since Section 401 applies to *other* pollutions than industrial wastes. (Appellant's Post-Hearing Brief, p. 52). It is apparent that Lawrence's entire reliance upon this argument is based upon the heading of Section 401, which reads "Prohibition against other pollutions." We cannot accept such a basis as propounded by Lawrence in light of the language of the section. The operative language of Section 401 is "...any substance of any kind or character..." Such language is not limited as argued by Lawrence. Assuming that because of the discrepancy between the heading of this statutory section and its substantive language, that the section is somehow not explicit or unclear, the tenets of statutory construction provide aid and interpretation. Initially, §1924 of the Statutory Construction Act. 1 Pa. C.S.A. §1924, provides, in pertinent part, that "...The headings prefixed to titles, parts, articles, chapters, sections, and other divisions of a statute shall not be considered to control but may be used to aid in the construction thereof." The title of Section 401 in and of itself provides no particular aid in construction, so resort to legislative intent is necessary. Section 1921(c)(5) of the Statutory Construction Act, 1 Pa. C.S.A. §1921(c)(5), notes that "The former law, if any, including other statutes upon the same or similar subjects" may be consulted. Before the 1970 amendments to the CSL, §401 contained the

following language "Nothing contained in this section shall be construed to apply to any sewage or industrial waste the discharge of which is regulated or prohibited by the preceding sections of this act. . ." That language was expressly deleted in 1970. Since mine drainage is, and even then, was a species of industrial waste, we hold that the General Assembly's intent in 1970 was to broaden the application of Section 401.

Before we assess civil penalties, we will address the various issues concerning the total number of Lawrence's violations.

Lawrence's Violations

DER urges the Board to assess civil penalties against Lawrence for so-called continuing violations, i.e., violations which allegedly can be inferred to occur over a period of time on the basis of observations of those violations on a number of days during the relevant time period.

The Board held in *DER v. Medusa Corporation*, 1978 EHB 149, that no civil penalties could be assessed for a continuing violation of the weight rate standard under the Air Pollution Control Act and 25 Pa. Code §123.13 in the absence of test data to support the inference of a continuing violation. We believe that the latter holding in *Medusa* concerning continuing violations is applicable to the circumstances presented herein. As DER's own witnesses testified, the characterization of mine discharges as AMD involves sampling and scientific analysis to determine the various levels of different parameters—pH, acidity, iron, manganese, aluminum, total suspended solids—which indicate the AMD is indeed present. DER sampled the discharges in question on January 23, February 28, March 20, May 13, May 21,

June 10, June 20, July 7, July 22, August 14 and October 3, 1980. We believe that this sampling was sufficiently connected in time to establish the existence of continuing violations from January 28 to October 3, 1980. The sampling intervals were 36, 21, 54, 8, 20, 10, 17, 15, 23, and 50 days respectively. Over successive months, the exceedance of the applicable effluent limits was both substantial and consistent, so as to indicate the generation of AMD. Therefore, Lawrence will be assessed civil penalties for causing continuous unlawful discharges of AMD from culverts 2, 3, and 4 at the Rogers Mill Strip from January 23, 1980 to October 3, 1980, a period of 254 days.

An obvious continuing violation can also be inferred from Lawrence's failure to implement and maintain adequate erosion and sedimentation controls on the Rogers Mill Strip (MP 5) by delaying the construction of a siltation control ditch until at least May 27, 1980 (see findings of Fact Nos. 44, 96 and 97). Lawrence's violation of DER's rules and regulations concerning adequate erosion and sedimentation controls is not the type of violation, as is true with AMD discharges, which needs to be observed and then verified by sampling and scientific analysis. Rather, DER's observations showed that the flow of AMD discharges to culverts 3 and 4 was greatly reduced after Lawrence constructed the siltation control ditch. (See Findings of Fact No. 44). We hold specifically that Lawrence's failure to construct the siltation ditch until June 10, 1980--after DER notified Lawrence on February 28, 1980 of the violation (T 363)--constituted a continuing violation of 25 Pa. Code §102.4(a) for that time period (104 days). The willfulness aspect of this violation will be discussed *infra*.

Lawrence is also subject to civil penalties for the violations which occurred as a result of its mining activities on the Spruell Strip. Specifically, these include a failure to implement and maintain adequate erosion and sedimentation controls on September 4, 1980, and a discharge of AMD on the same date. (See Findings of Fact Nos. 121 and 122).

Finally, Lawrence is subject to civil penalties for its failure to provide settling basins on May 12, 1980 and July 1, 1980 (see Findings of Fact Nos. 109 and 112). Also, it should be noted that there was testimony indicating that Lawrence failed on two occasions to dispose of pit rejects in accordance with Special Condition 29 of the mining permit. These two violations will not serve as a basis for civil penalties since DER's complaint is deficient with respect to the date of violation and the permit area. DER's amended complaint does not cure this defective pleading, and DER has not moved the Board to amend the complaint to conform to proof with regard to this issue.

Lawrence has no liability for civil penalties for causing the AMD discharges at culvert 1 since DER admits that the sole source of these discharges was the sediment pond located on the area covered by mining permit no. 1063-5(A). (DER's brief, pp. 44, 49; DER's reply brief, p. 5). Violations which occurred as a result of Lawrence's mining activities on the area covered by mining permit no. 1063-5(a) cannot form the basis for assessment of civil penalties herein due to our holding *supra* which disallowed DER's motion to amend its complaint to include the area covered by mining permit no. 1063-5(A). In addition, Lawrence has no liability for civil penalties herein for causing the AMD discharges at culvert 5 due to the fact that DER indicated at the hearings that it

was not seeking civil penalties for these discharges. (T 1114, 1118). Also, former Board Chairman Harnish, who presided over the hearings, ruled that the AMD discharges at culvert 5 would not serve as the basis for assessing civil penalties. (T 1120, 1122-23, 1126).

To summarize, Lawrence is subject to civil penalties for a total number of 362 violations. This figure is composed of the following: 254 violations associated with unlawful AMD discharges at culverts 2, 3 and 4; 104 violations for the continuing violation of failing to construct a siltation control ditch for 104 days; two violations for failure to settle out metals on May 12, 1980, and July 1, 1980;[3] and, two violations for the AMD discharge and inadequate erosion and sedimentation controls at the Spruell Strip (MP 1063-8) on September 4, 1980. We turn now to a consideration of the factors which guide us in the asessment of civil penalties for these violations.

Civil Penalty Factors

Section 605 of the CSL authorizes the assessment of a civil penalty of up to $10,000 per day per violation and states that the assessment of civil penalties should be guided by consideration of the following factors: "the wilfullness [sic] of the violation, damage or injury to the waters of the Commonwealth or their uses, costs of restoration, and other relevant factors." It should be noted that DER has presented no evidence concerning cost of restoration. Therefore, since we cannot speculate as to such costs, this factor will be disregarded.

[3] DER seeks a civil penalty for Lawrence's failure to settle out metals on only two dates, even though the evidence indicates that Lawrence's failure in this regard was continuous, at least up until the time when settling basins were constructed. However, we are bound by the specific counts of DER's complaint.

However, there is ample evidence in the record concerning the other factors and we will consider each factor in relation to the above violations. In addition, the Board has used the catchall phrase "other relevant factors" to include the important factor of deterrence of violations by the defendant or others similarly situated. *DER v. Jefferson Township*, 1978 EHB 134. We will also consider that factor in assessing civil penalties against defendant Lawrence.

With the exception of the AMD discharge from the Spruell Strip into Morgan Run, all the other AMD discharges and erosion and sedimentation violations impacted Buck Run and its unnamed tributary. Although there are indications that Buck Run and its unnamed tributary were polluted from another source,[4] this fact does not serve as a defense to an action for civil penalties. *DER v. Rushton Mining Company*, 1976 EHB 117. Section 606 of the CSL specifically empowers the Department to proceed against a discharger even though the receiving stream has been polluted from other sources. *Commonwealth v. Gilpin*, 52 Pa. Cmwlth. 414, 415 A.2d 1002 (1980).

DER argues that the damage to or injury to the waters of the Commonwealth consisted of degradation of the physical, chemical and biological quality of Buck Run--a high quality, cold water fishery. Lawrence argues that DER's water quality samples indicate that no chemical degradation occurred. Further, with regard to

---

[4] The other source was Marsolino Coal and Coke, Inc., which operates a number of strip mining sites, one of which is adjacent to and immediately uphill of Lawrence's Rogers Mill Strip. DER filed a complaint for civil penalties against Marsolino on February 25, 1981, the same date the complaint at issue herein was filed. *DER v. Marsolino Coal and Coke, Inc.*, EHB Docket No. 81-020-CP-H. On August 18, 1982, the Board approved the settlement of DER's complaint against Marsolino.

DER's allegation concerning biological and physical degradation, Lawrence's expert biologist testified that the evidence did not support such an allegation. Although some DER water samples could be interpreted in the manner Lawrence suggests, the overwhelming majority of those samples indicate that the physical, biological and chemical qualities of Buck Run and its unnamed tributary were degraded as a result of the AMD discharges and erosion and sedimentation violations. Furthermore, the fish population in the area was depressed as a result of Lawrence's discharge. (See Findings of Fact Nos. 113 and 114). Consequently, at least moderate damage to the waters of the Commonwealth occurred.

Concerning the factor of wilfulness of the violation, the Board has in the past noted the different degrees of wilfulness and the fact that the amount of the civil penalty should reflect the degree of wilfulness of the violator. *DER v. Jefferson Township, supra*, and *DER v. Rushton Mining Company, supra*. As the Board stated in *Rushton*:

> Without binding the Board to tort law (where the law has developed to deal with direct injuries to the person rather than the environment), that law does provide an analysis of the degrees of knowing or wilful conduct that is useful in considering this element for purpose of civil penalties. For instance, there is clearly a difference between deliberate, intentional acts, which are the most "wilful," see, e.g., *Evans v. Philadelphia Transit Company*, 418 Pa. 567, 573-74 (1965); and accidental, unintentional, unknowing negligence, which is in no sense wilful. See Restatement of Torts, 2nd Vol. 2, 282. In between, are degrees of negligence or misconduct with varying degrees of knowledge attached, which may make an act more or less wilful, although not amounting to "wilful misconduct" in tort law. *Thus, although an act may not be wilful in the deliberate*

> *or intentional sense, there may be a degree of wilfulness evident from knowledge that certain consequences are likely to result if that act is done in this manner or from failure to take the care that is required to avoid likely injurious consequences from that act.*

DER v. Rushton Mining Company, 1976 EHB at 132-33. (Emphasis added). The Board has recently further construed the concept of wilfulness in *Refiners Transport and Terminal Corp. v. DER*, EHB Docket No. 84-132-G (adjudication issued May 14, 1986) and *Southwest Equipment Rental Inc. v. DER*, EHB Docket No. 83-175-M (adjudication issued May 14, 1986). There are essentially three degrees of wilful conduct—intentional, reckless, and negligent, which are distinguished by a person's recognition that his conduct may result in a statutory violation.

DER argues that Lawrence engaged in wilful conduct when it allowed the untreated and/or inadequately treated AMD to discharge into Buck Run and its unnamed tributary. However, Lawrence argues that there can be no wilful conduct when Lawrence contested from the outset DER's determination (through its mine inspector) that Lawrence was responsible for the AMD discharges at the culverts. Although Lawrence's argument admittedly has some appeal at first blush, it does not withstand sustained scrutiny. After all, wilful conduct does not miraculously cease to be of that character by virtue of the fact that the violator disclaims responsibility. If that were so, and since nearly all violators disclaim responsibility, there would never be any wilful conduct.

Rather, wilful conduct, as stated in *Rushton, supra*, can be said to involve knowing the likely consequences of a certain course of action—one which need not be related

to whether or not the putative violator accepted DER's determination of responsibility. As the Board stated in *Rushton*:

> Respondent [Rushton] could have ceased to mine until it developed a reliable means for treating its acid mine drainage or at least learned of a satisfactory treatment process from other sources. Instead, Rushton quite naturally chose to proceed with mining and to develop an adequate treatment process on something of a tried [sic] and error basis—with the consequent risk that discharges in violation of the permit limitations might very well occur. This is not to say that such violations were wilful in the most intentional sense. However, there is some sense in which Rushton knowingly chose to take the consequences of likely discharges to the waters of the Commonwealth in violation of its permit.

Rushton, supra, 1976 EHB at 134. Rushton's conduct was reckless in the sense that it was aware that its treatment method was not likely to be effective and still went forward. The circumstances which were present in *Rushton* are sufficiently analogous to the circumstances presented herein, since the record indicates that Lawrence continued mining and treating with soda ash briquettes after DER notified Lawrence of the ineffectiveness of Lawrence's treatment process. (T 71-73). Thus, with regard to the continuing unlawful AMD discharges from the Rogers Mill Strip, Lawrence engaged in reckless conduct.

The same analysis of wilfulness is applicable to the erosion and sedimentation violations. Clearly, Lawrence knew that it was required to build siltation control ditches. Also, notwithstanding Lawrence's contrary statements, it certainly must have been aware that use of roads as a substitute for the requisite siltation control

ditches possibly would not adequately serve the purpose for which they were intended, but nevertheless chose to disregard that possibility. That is, at the very least, Lawrence knew that the likely consequences of its use of the roads as siltation control ditches would be inadequate erosion and sedimentation controls. The record does indicate, as was true with the AMD discharges and Lawrence's inadequate treatment of them, that DER informed Lawrence that siltation control ditches had to be installed. (T 72-74). This notification was given on February 28, 1980. Thus, for the 104-day period during which Lawrence failed to have adequate erosion and sedimentation controls in place, Lawrence's delay in beginning construction of a siltation control ditch amounted to intentional conduct, wilful conduct of the highest degree for the period from February 28, 1980 until May 27, 1980—89 days of the 104-day period of the aforementioned continuing violation of failing to maintain adequate erosion and sedimentation controls. Thus, Lawrence is liable for greater civil penalties for this 89-day period due to the intentional character of its conduct.

Finally, the remaining civil penalty factor we must consider is the factor of deterrence. DER correctly points out that the Board has in the past based the assessment of civil penalties upon, *inter alia*, the factor of deterrence of the violator and others similarly situated. Moreover, Commonwealth Court has approved of the Board's consideration and use of this factor. *Trevorton Anthracite Co. v. DER*, 42 Pa. Cmwlth. 84, 400 A.2d 240 (1979). In addition, the Board has, on at least one occasion, assessed civil penalties solely upon the basis of the deterrence factor. *DER v. Federal Oil and Gas Co.*

and James V. Joyce, t/d/b/a Joyce Pipeline Co., 1975 EHB 186. In summarizing its civil penalties assessment in *Federal Oil and Gas*, the Board stated:

> We are mindful, however, that the imposition of civil penalties also functions as a deterrent. Recognizing the need to protect the trout streams of the Commonwealth and to discourage even minimal pollution of them, we feel the violations here require the imposition of civil penalties if for no other purpose than to remind the Defendants and others engaged in the well drilling business that they must take all necessary and diligent precautions to assure that their activities do not result in any discharges into the waters of the Commonwealth. Accordingly, basing its determination solely on the deterrent value of the penalties, the Board assesses penalties in this case as follows: $1,000.00 for the initial discharge of industrial wastes under Count One of the Complaint, plus $100.00 per day for the continuous discharges of drilling fines and/or observed oil on November 19, 20, 23, 24 and 25, 1973, or a total of $1,500.00 to be assessed against Federal individually.

Federal Oil and Gas, supra, 1975 EHB at 198.

The principle set forth above offers us guidance in our assessment of civil penalties based upon their deterrent effect. When a high quality, cold water fishery has been degraded as a result of both unlawful AMD discharges and inadequate erosion and sedimentation controls, we believe that a portion of the civil penalties assessed must necessarily include an amount attributable to the value of deterrence.

Computation of the Amount of Civil Penalties.

Having enunciated these standards for assessment of civil penalties, we proceed to apply them in the assessment of the civil penalty. Because the Board itself

must determine the amount of civil penalty under §605 as it existed prior to the 1980 amendments to the CSL, we have only the language of §605 of the CSL and prior precedent to guide us, unlike in *Refiners Transport and Terminal, Inc., supra*, where DER initially assessed the civil penalty based on an internal policy. Section 605, as noted supra, permitted the assessment of civil penalty of up to $10,000 per day per violation, which, if applied to the continuing discharges of AMD from culverts 2, 3 and 4 would lead to the assessment of a maximum penalty of at least $2,590,000 for the discharges alone.

We have determined that the discharges from culverts 2, 3 and 4 were continuing for a period of 254 days, that they were reckless, and that they resulted in moderate damage to a high quality, cold water fishery. We will assess a penalty of $500 per violation, or a total penalty of $127,000. We will assess a civil penalty of $100 per violation for Lawrence's two violations for failure to settle out metals since we believe they are extremely minor in comparison to the AMD discharges.

Lawrence's failure to construct and maintain erosion and sediment controls at the Rogers Mill Strip has been held to be a continuing violation for a period of 104 days, 89 days of which were intentional. It, too, resulted in moderate damage to a high quality, cold water fishery. We will assess a penalty of $250 per day for the first 89 days and a penalty of $50 per day for the last 15 days, or a total of $23,000.

For the violations at the Spruell Strip, a penalty of $500 will be assessed for the unlawful AMD discharge and $100 for failure to provide adequate erosion and sediment controls.

In summary, then, defendant Lawrence Coal Company is hereby assessed the following civil penalties for the aforementioned violations of the CSL:

Rogers Mill Strip	
Unlawful discharges of AMD (254 violations)	$127,000
Failure to provide adequate erosion and sediment controls (89 violations)	22,250
Failure to provide adequate erosion and sediment controls (15 violations)	750
Failure to settle out metals (2 violations)	100
Total for Rogers Mill Strip	$150,100
Spruell Strip	
Unlawful discharge of AMD	$ 500
Failure to provide adequate erosion and sediment controls	100
Total for Spruell Strip	600
TOTAL	$150,700

Conclusions of Law

1. The Environmental Hearing Board has jurisdiction over the parties to and the subject of this appeal. 71 P.S. §510-21.

2. This civil penalties action is authorized by Section 605 of the CSL. 35 P.S. §691.605.

3. DER has the burden of proving by a preponderance of the evidence that Lawrence violated applicable statutes and regulations and that there is a basis for the Board to assess civil penalties. 25 Pa. Code §§21.101(a); 21. 101(b)(1); *DER v. Federal Oil and Gas Co. and James v. Joyce, t/d/b/a Joyce Pipeline Company*, 1975 EHB 186.

4. In determining the amount of civil penalties to be assessed in an action brought pursuant to the Clean Streams Law, the Board must consider:

(i) the wilfulness of the violation; (ii) the damage or injury to the waters of the Commonwealth or their uses; (iii) cost of restoration; and (iv) other relevant factors. 35 P.S. §691.605.

5. The AMD discharges at culverts 2, 3 and 4 emanate from Lawrence's mining operations at the Rogers Mill Strip.

6. Buck Run and its unnamed tributary are waters of the Commonwealth. 35 P.S. §691.1.

7. Lawrence's discharges from culverts 2, 3 and 4 constituted violations of Sections 3, 301, 307, 315, and 401 of the CSL.

8. During the time covered by DER's complaint, Lawrence's surface mining operations were subject to 25 Pa. Code §77.92(c) (since repealed) 25 Pa. Code §95.1, 25 Pa. Code §99.33 (since repealed) (collectively "the effluent limits") and 25 Pa. Code §102.4(a).

9. The analyses of the samples collected by DER at culverts 2, 3 and 4 on January 23, February 28, March 20, May 13, May 21, June 10, June 20, July 7, July 22, August 14, and October 3, 1980 establish a continuing violation of the effluent limits from January 23 to October 3, 1980. *DER v. Medusa Corporation*, 1978 EHB 149.

10. Lawrence's discharge of AMD from culverts 2, 3, and 4 evidences reckless conduct. *DER v. Rushton Mining*, 1976 EHB 117, and *Refiners Transport and Terminal Corp. v. DER*, EHB docket No. 84-132-G (adjudication issued May 14, 1986).

11. From February 28, 1980, to May 27, 1980, Lawrence intentionally failed to implement and maintain adequate erosion controls at the Rogers Mill Strip in violation of 25 Pa. Code §102.4.

12. From May 28, 1980, to June 10, 1980, Lawrence failed to implement and maintain adequate erosion controls at the Rogers Mill Strip in violation of 25 Pa. Code §102.4.

13. On May 12, 1980, and July 1, 1980, Lawrence failed to settle out metals at the Rogers Mill Strip in violation of §§301, 307, and 315 of the Clean Streams Law and 25 Pa. Code §§77.92(c), 99.33, and 95.1.

14. On September 4, 1980, Lawrence discharged AMD from the Spruell Strip into a tributary of Morgan Run in violation of §§301, 307, 315 and 401 of the CSL and 25 Pa. Code §§77.92(c), 99.33, and 95.1.

15. On September 4, 1980, Lawrence failed to provide adequate erosion and sediment controls at the Spruell Strip in violation of §402 of the CSL and 25 Pa. Code §102.4(a).

16. DER met its burden of proving by a preponderance of the evidence that defendant Lawrence was responsible for the above violations of the CSL and the rules and regulations adopted thereunder and that imposition of civil penalties by the Board was appropriate.

ORDER

AND NOW, this 27th day of May, 1986, civil penalties are hereby imposed upon Lawrence Coal Company in the amount of $150,700 for violations of the CSL and the rules and regulations adopted thereunder.

The entire civil penalty is due and payable into the Clean Water Fund immediately. The Prothonotary of Fayette County is hereby ordered to enter this penalty as a lien against any property of Lawrence Coal Company, with interest at the rate of 6% per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

ENVIRONMENTAL HEARING
BOARD
MAXINE WOELFLING
Maxine Woelfling, *Chairman*
EDWARD GERJUOY
Edward Gerjuoy, *Member*

cc: Bureau of Litigation

For the Commonwealth:
Diana Stares, Esq./Western

For the Appellant:
William M. Radcliffe, Esq.
Coldren & Coldren
Uniontown, PA

DATED: May 27, 1986

Supreme Court, U.S.
FILED
APR 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1482

In the Supreme Court of the United States

October Term, 1989

LAWRENCE COAL COMPANY,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

DENNIS STRAIN
Counsel of Record
STEVEN LACHMAN
Attorneys for Respondent
Commonwealth of Pennsylvania,
Department of Environmental Resources
Office of Chief Counsel
Third Floor, City Towers
Third and Chestnut Streets
Harrisburg, PA 17120
(717) 787-4449

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

I. Has the Petitioner, under the principles of *res judicata* and judicial estoppel waived its right to challenge the adjudication of the Pennsylvania Environmental Hearing Board?

II. Whether the Petitioner received full due process of law in the adjudication of its case by the Pennsylvania Environmental Hearing Board?

III. Does the Petitioner raise any important question of federal law meriting review by the Supreme Court of the United States?

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Respondent's Brief in Opposition to the Petition for Writ of Certiorari	1
Opinions Below	2
Counterstatement of the Case	3
Summary of Argument	7
Reasons for Denying the Writ of Certiorari:	
I. Under the principles of res judicata and judicial estoppel Petitioner waived its right to challenge the Adjudication of the Pennsylvania Environmental Hearing Board	8
II. Petitioner received full due process of law in the Adjudication of its case by the Pennsylvania Environmental Hearing Board	10
III. Petitioner raises no important question of federal law meriting review by the Supreme Court of the United States	12
Conclusion	13

APPENDIX:

Order, dated April 8, 1988 of the Commonwealth Court of Pennsylvania at No. 3062 C.D. 1986 . . . 1a

---

TABLE OF AUTHORITIES

CASES:

Associated Hospital Service of Philadelphia v. Pustilnik, 497 Pa. 221, 439 A.2d 1149 (1981) . . . 10

Brown v. Com., Department of Health, 495 Pa. 456, 434 A.2d 1179 (1981) 9

Federal Trade Commission v. Cement Institute, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948) . . . 11

Federal Trade Commission v. Flotill, 389 U.S. 179, 88 S.Ct. 401, 19 L.Ed. 2d 398 (1967) 8, 9

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed. 2d 103 (1981) . . . 9

Gardner v. Repasky, 434 Pa. 126, 252 A.2d 704 (1969) . 9

Gibson v. Berryhill, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488 (1973) 8

In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) 8, 11

Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed. 2d 903 (1983) 13

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976) 10, 11

Railroad Yardmasters of America v. Harris, 721 F.2d 1332 (D.C. Cir. 1983) 8

Rice v. Sioux City Memorial Parks Cemetery, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955) 12

Schweiker v. McClure, 456 U.S. 188, 102 S.Ct. 1665, 72 L.Ed. 2d 1 (1982) 11

Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed. 2d 712 (1975) 8, 11

STATUTES:

35 P.S. §691.5 3

35 P.S. §691.315 3

35 P.S. §7513(b) 12

45 U.S.C. §§151-163, 181-188 8

RULE OF COURT:

U.S. Supreme Court Rule 17, 28 U.S.C.A. 12

OTHER AUTHORITY:

9 Standard Pennsylvania Practice, Ch. 38, §162 10

No. 89-1482

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

LAWRENCE COAL COMPANY,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,

DEPARTMENT OF
ENVIRONMENTAL RESOURCES

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO

THE PETITION FOR WRIT OF CERTIORARI

The Commonwealth of Pennsylvania, Department of Environmental Resources, Respondent in the action below, respectfully prays that this Honorable Court deny the Writ of Certiorari to the denial of appeal by the Pennsylvania Supreme Court, filed on the 18th day of December, 1989.

OPINIONS BELOW

The Order of the Commonwealth Court of Pennsylvania, dated April 8, 1988, remanding the case to the Pennsylvania Environmental Hearing Board for reconsideration and a new decision, is reproduced in the Appendix. Respondent concurs in the Petitioner's presentation of the other relevant opinions below, as presented in Appendices A through E of the Petition for Writ of Certiorari.

COUNTERSTATEMENT OF THE CASE

Petitioner, Lawrence Coal Company (hereinafter "Lawrence") seeks to reverse the decision of the Pennsylvania Supreme Court, the Pennsylvania Commonwealth Court, and the Pennsylvania Environmental Hearing Board (hereinafter "Board") to assess civil penalties against Lawrence in favor of the Respondent, Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter "DER") for violations by Lawrence of the Clean Streams Law, 35 P.S. §§691.5 and 691.315 (Purdon's 1977). The procedural history of this case is as follows:

> On February 25, 1981 DER filed with the Pennsylvania Environmental Hearing Board a Complaint for Civil Penalties against Lawrence, alleging (1) the discharge of acid mine drainage, (2) the failure to implement and maintain effective erosion and sedimentation controls, (3) the failure to properly dispose of toxic waste, and (4) the disturbing of land designated as a barrier. The allegations pertained to Lawrence's surface coal mining operations in Springfield and Dunbar Townships, Fayette County, Pennsylvania during 1980 and 1981. Lawrence contested DER's Complaint. Eleven days of evidentiary hearings before Board Chairman Dennis J. Harnish concluded on November 23, 1982, although an additional deposition and exhibits were admitted to the record on January 31, 1983. The integrity of the evidentiary record has never been challenged.
>
> Board Chairman Harnish resigned from the Board on May 16, 1983, without having prepared an adjudication. On September 15, 1983 the Board appointed Edward R. Casey as a Hearing Examiner to review the

record. Following a suggestion made by Mr. Casey to counsel that the case be settled for a maximum of $1000, on November 7, 1983 DER filed a Petition for Recusal of Mr. Casey and a Motion for Reassignment, alleging, *inter alia*, that Mr. Casey had ignored a recommendation of former Chairman Harnish to find in favor of DER. The Board granted DER's Petition and Motion, and reassigned the case to Board Member Anthony J. Mazullo, Jr. for the preparation of Adjudication.

On November 30, 1983, Lawrence filed a petition requesting either a dismissal of the case because of alleged improper communications between former Board Chairman Harnish and legal counsel for DER or, in the alternative, a reassignment of the case to a neutral hearing examiner who was not involved with the Board during Harnish's tenure. The Board denied the petition (per Members Mazullo and Edward Gerjuoy).

Board Member Mazullo prepared a draft Adjudication which had not been adopted by the Board at the time of his resignation on January 31, 1986. On May 27, 1986, the Board (per Chairman Maxine Woelfling and Member Gerjuoy) issued an Adjudication, which adopted Mazullo's draft with certain modifications, and which assessed civil penalties against Lawrence in the amount of $150,700.

On June 6, 1986 Lawrence filed a Petition for Reconsideration, which, as supplemented, requested that the Adjudication of May 27, 1986 be vacated and that Chairman Woelfling and Member Gerjuoy be recused from any further participation in the case. On June 24, 1986 William A. Roth became a Member of the Board. On September 19, 1986 the Board (per Members Gerjuoy

and Roth) denied the Petition for Reconsideration, and dismissed the request for the recusal of Chairman Woelfling.

Lawrence filed with the Pennsylvania Commonwealth Court on October 16, 1986, a Petition for Review of the Board's orders of September 19, 1986 and May 27, 1986. In its Petition Lawrence made the following alternative prayer for relief;

... (c) Remand the matter to the Environmental Hearing Board and appoint an unbiased hearing examiner who had not previously served with the Department of Environmental Resources to make recommendations to the Environmental Hearing Board.

On January 25, 1988, the Commonwealth Court vacated the Board's orders and remanded the case for new hearings, finding that "... a possibility of unfairness to Lawrence exists and that improprieties might have occurred." On April 8, 1988 Commonwealth Court amended its decision to provide for a new Adjudication, to be issued within 90 days, on the basis of the 1982 record and associated briefs and papers, and without the participation of Chairman Woelfling and Member Roth. Implicit in the Court's ruling was that the Adjudication would be made by Robert D. Meyers who had succeeded Member Gerjuoy on December 7, 1987 as a member of the Board, as throughout these proceedings the Board was limited by statute to three members. *See* 71 P.S. §180-2 (Purdon's 1988 supp.), *repealed*, July 13, 1988, P.L. 530, No. 94, §8(a), effective January 1, 1989.

Neither Lawrence nor DER appealed the January 25, 1988 and the April 8, 1988 orders of the Commonwealth Court, leaving unchallenged the remand for an

Adjudication by one Board member based upon the preexisting record. In accord with the unappealed Commonwealth Court orders, on July 5, 1988 the Board (per Member Meyers) issued an Adjudication based upon the preexisting record, in which he assessed civil penalties against Lawrence in the amount of $104,500.

On August 3, 1988 Lawrence filed a Petition for Review in Commonwealth Court of the Board's July 5, 1988 Adjudication. By its Memorandum Opinion of July 12, 1989 Commonwealth Court upheld the Board's Adjudication, holding that: the issue of whether the Board's decision was tainted was already resolved in Lawrence's previous appeal; under Pennsylvania regulations and common law a single Board Member can base an Adjudication upon a preexisting record; and the Board's Adjudication was based upon substantial evidence.

From the Commonwealth Court decision Lawrence filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, which petition was denied on December 19, 1989.

In conclusion, Lawrence petitioned the Board in 1983 and the Commonwealth Court in 1986 for reassignment of the case to a single Board Member or Hearing Examiner who joined the Board after Chairman Harnish's tenure, and then Lawrence failed to appeal the January 25, 1988 and April 8, 1988 Commonwealth Court orders which remanded this case to the Board for an Adjudication by a Member of the Board who was appointed to that post three and a half years after Chairman Harnish resigned. In spite of this procedural background, Lawrence now argues to this Honorable Court that it should now be granted yet another chance to complain of impropriety in the Environmental Hearing Board's Adjudication.

SUMMARY OF ARGUMENT

Having sought to have the unchallenged record reconsidered by the Environmental Hearing Board and having acquiesced in the Commonwealth Court decision ordering that reconsideration, the Petitioner cannot now challenge the propriety of that procedure. If the challenge is allowed, it fails to establish a denial of due process because the allegations of bias are merely speculative. In any event, the procedural posture of this case is so unique and so unlikely of repetition, that it does not warrant review by this Honorable Court.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. Under The Principles Of Res Judicata And Judicial Estoppel Petitioner Waived Its Right To Challenge The Adjudication Of The Pennsylvania Environmental Hearing Board

Petitioner Lawrence Coal Company contends that the Adjudication of its case by a member of the Pennsylvania Environmental Hearing Board who had not yet been appointed to the Board at the time the Board issued its previous Adjudication, was inherently biased, in violation of the Petitioner's right to due process of law. Petitioner has not supported its contention with any dispositive law,* and what it

*A review of the case citations provided by the Petitioner in support of its argument shows each to be inapposite to the circumstances of this case. *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), concerned due process violations by a Michigan Judge who acted as a grand jury in closed proceedings, and then presided over the contempt trial against witnesses who had appeared before him in the grand jury proceedings. In *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488 (1973), this court held that the pecuniary interest of the members of Alabama Board of Optometry in the punitive delicensing of thirteen optometrists was sufficient bias to disqualify the Board members from adjudicating the delicensing case which the Board itself was prosecuting. However, in the present case the Petitioner has made no allegation of pecuniary interest against Environmental Hearing Board Member Meyers. The holding of *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed. 2d 712 (1975), that an administrative board could both investigate and adjudicate, is irrelevant here; the Environmental Hearing Board did not investigate or prosecute DER's civil penalty claim against the Petitioner. The Petitioner correctly notes that the case of *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332 (D.C. Cir. 1983) revolves around an interpretation of the administrative delegation provisions of the Railway Labor Act, 45 U.S.C. §§151-163, 181-188, and is unconcerned with Pennsylvania administrative and environmental law. Petitioner's reference to *Federal Trade Commission v. Flotill Products, Inc.*, 389 U.S. 179, 88 S.Ct. 401, 19 L.Ed. 2d 398 (1967), which concerned

characterizes as "logic" is but remote speculation. On remand from the first unappealed order of the Pennsylvania Commonwealth Court, Petitioner received a fair and impartial adjudication.

In the January 25, 1988 decision by the Commonwealth Court of Lawrence's first appeal, and in the April 8, 1988 order that the Board adjudicate the case within 90 days without the participation of two of its three members, the Court addressed the future potential for bias, and how many Board Members could adjudicate the case. That decision left only one Member, Robert D. Meyers, to issue the Adjudication. Lawrence did not appeal the Commonwealth Court's orders, and the remand became final. Board Member Meyers' lawful ability to decide the case, and to do so in an untainted manner, is thus *res judicata*. It is not now subject to review merely because the result on remand was more adverse than the Petitioner had hoped. See *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 69 L.Ed. 2d 103 (1981). Pennsylvania's highest court is in accord with this principle: "Ordinarily, a party who consents to, or acquiesces in a judgment or order cannot appeal therefrom." *Brown v. Com., Department of Health*, 495 Pa. 456, 460, 434 A.2d 1179, 1181

---

the voting requirements of the Federal Trade Commission, is misplaced for two reasons. First, Commonwealth Court has already decided how many members of the Environmental Hearing Board were needed to adjudicate this case; the Petitioner did not appeal from that decision, and thus, under the doctrine of *res judicata*, that issue is not before this Court. Second, Commonwealth Court's resolution of the issue involved the interplay of the statutory, regulatory, and common law of Pennsylvania, all of which were beyond the scope of *Flotill*, a case of federal origin. In the Pennsylvania case cited by the Petitioner, *Gardner v. Repasky*, 434 Pa. 126, 130, 252 A.2d 704 (1969), the Pennsylvania Supreme Court found an unacceptable likelihood of bias where a member of a municipal Fire Board which complained about a policeman, also sat on the Civil Service Commission which ordered the policeman's suspension. Board Member Meyers played no such dual role.

(1981), quoting 9 *Standard Pennsylvania Practice*, Ch. 38, §162, pp. 134-35. To allow the Petitioner to relitigate this matter would create confusion and uncertainty as to the finality and effect of the judgments of the Commonwealth Court.

Ironically, the relief granted to Lawrence by the Commonwealth Court (i.e. remand for an Adjudication by a Board Member not associated with previous proceedings in the case) is the relief Lawrence requested in its November 30, 1983 Petition to the Board and in its October 16, 1986 Petition for Review filed with Commonwealth Court. Pennsylvania recognizes the principle of judicial estoppel, by which a party is estopped from assuming a position contrary to one assumed in a previous action if that position was successfully maintained. *Associated Hospital Service of Philadelphia v. Pustilnik*, 497 Pa. 221, 227, 439 A.2d 1149, 1151 (1981). Therefore, Lawrence may not now complain that such relief violated its rights.

II. Petitioner Received Full Due Process Of Law In The Adjudication Of Its Case By The Pennsylvania Environmental Hearing Board

---

Even were a due process analysis warranted, Lawrence's petition is deficient. In *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976), this Court laid out several factors to consider in determining what process is due a petitioner claiming a violation of its procedural rights. Respondent DER does not contest the Petitioner's property interest in the civil penalty levied by the Board; also, there has been no argument as to the cost of alternative administrative procedures. Therefore, the merit of the Petitioner's claim

hinges on the second prong of the *Mathews* test: "the risk of an erroneous deprivation of such [property] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. . . ." *Id.* at 424 U.S. 335.

Administrative hearing officers are presumed unbiased. The party asserting a claim of bias bears the burden to rebut the presumption, "... by a showing of a conflict of interest or some other reason for disqualification." *Schweiker v. McClure*, 456 U.S. 188, 195-196, 102 S.Ct. 1665, 1670, 72 L.Ed. 2d 1 (1982). While the Petitioner baldly asserts that Board Member Meyers was placed in an "impossible position" when asked to redecide a case already adjudicated by the Board, it has failed to provide this Court with even the barest evidentiary foundation to show that Board Member Meyers was potentially subject to undue influence, or in any way predisposed against the Petitioner. Lawrence goes on to say: "To decide contrary to the prior decision of his colleagues would be a public betrayal." *Id.* Under this hypothesis a judge or administrative law judge would be disqualified any time he received a remand of a case handled by another judge of the same court. Accordingly all remands would result in dismissal or change of venue. This absurd situation is not the law. In fact judges can, and often do, adjudicate remands of cases they themselves heard in the first instance. See *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed, 2d 712 (1975), citing *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948). No probability of unfairness has clouded the adjudication issued by Board Member Meyers. See *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

III. Petitioner Raises No Important Question Of Federal Law Meriting Review By The Supreme Court Of The United States

Lawrence's Petition does not fall within the general criteria established by this Court under U.S. Supreme Court Rule 17, 28 U.S.C.A., for granting review on certiorari. The Petitioner has not alleged that the decision of the Commonwealth Court of Pennsylvania is in conflict with decisions of this Court or the highest court of other states. The Petitioner has never objected to the evidentiary record upon which the Board based its Adjudication. On remand from the Commonwealth Court, Board Member Meyers issued a fair decision, kinder to the Petitioner than the Board's previous determination, and most important, untainted by any appearance of impropriety or likelihood of bias. By its failure to appeal the Commonwealth Court's previous rulings, the Petitioner has triggered the doctrines of *res judicata* and judicial estoppel, and thereby abandoned any constitutional challenges or federal questions it might have raised.

This case evolved through an unusual procedural turn of events, unlikely of repetition, particularly as the Pennsylvania legislature has increased the membership of the Environmental Hearing Board to five members. 35 P.S. §7513(b) (Purdon's 1977, 1989 supp.). Any due process questions which might have existed were a product of unique circumstance, unimportant to anyone but the Petitioner and Respondent in this case. See *Rice v. Sioux City Memorial Parks Cemetery*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955).

Petitioner asks this Court to review the interpretation of state law rendered by the Commonwealth Court, as to the membership and adjudication requirements of the Environ-

mental Hearing Board. As stated above, Petitioner waived this issue by its failure to appeal the January 25, 1988 and April 8, 1988 orders of that court. Furthermore, absent extraordinary circumstances, federal courts will defer to a state court's interpretation of that state's laws, including rulings by an intermediate state court where, as in the case at bar, the state's highest court has refused to hear a further appeal. *Kolender v. Lawson*, 461 U.S. 352, 355, 103 S.Ct, 1855, 75 L.Ed. 2d 903 (1983) (n.4). Here, Petitioner's challenge to the Commonwealth Court's construction of Pennsylvania law raises no federal question.

CONCLUSION

For the reasons set forth above, the Respondent, Commonwealth of Pennsylvania, Department of Environmental Resources, respectfully asks this Honorable Court to deny the Writ of Certiorari in this matter.

Respectfully submitted,
DENNIS STRAIN
Counsel of Record
STEVEN LACHMAN
Attorneys for Respondent

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Office of Chief Counsel
Third Floor, City Towers
Third and Chestnut Streets
P.O. Box 2357
Harrisburg, PA 17101-2702
(717) 787-4449

APPENDIX

Order of the Commonwealth Court of Pennsylvania Dated April 8, 1988

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 3062 C.D. 1986

LAWRENCE COAL COMPANY,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent

ORDER

AND NOW, April 8, 1988, upon consideration of Petitioner's application for reargument of the above-captioned case, it is ordered that said petition is denied. Further, upon consideration of Respondent's request for clarification of the order entered in the above-captioned case, the order is amended to read as follows:

> The order of the Environmental Hearing Board dated September 19, 1986, in the above-captioned case, affirming the board's prior May 27, 1986 adjudication is vacated. The matter is remanded to the Environmental Hearing Board for reconsideration and a new decision, to be issued within 90 days of the date of this order, on the basis of the 1982 record made before the Board and any associated briefs and papers filed by the parties. Maxine Woelfling and William A. Roth shall not participate in the reconsideration and new decision.

s/Madeline Palladino, Judge